No. 98-1856-CSX Title: Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., Petitioners
v.
Colorado, et al.

Docketed:
May 18, 1999 Court: Supreme Court of Colorado

Entry	Date	Proceedings and Orders
	May 17 1999	Petition for writ of certiorari filed. (Response due June 17, 1999)
	Jun 4 1999	Waiver of right of respondent David Thomas to respond filed.
	Jun 17 1999	Brief of respondents Colorado, et al. in opposition filed.
	Jun 30 1999	DISTRIBUTED. September 27, 1999
	Jul 2 1999	Reply brief of petitioners Leila J. Hill, et al. filed.
	Aug 13 1999	Record requested.
	Sep 1 1999	Record filed.
	Sep 2 1999	Record filed.
	Sep 28 1999	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT January 19, 2000. **********
	Nov 10 1999	Joint appendix filed.
	Nov 10 1999	Brief of petitioners Leila J. Hill, et al. filed.
	Nov 12 1999	Brief amicus curiae of People for the Ethical Treatment of Animals filed.
	Nov 12 1999	Brief amicus curiae of Liberty Counsel filed.
	Nov 12 1999	Motion of Alan Ernest to allow counsel to represent children unborn and born alive filed.
	Nov 12 1999	Motion of Alan Ernest for leave to file a brief as amicus curiae filed.
	Nov 12 1999	Brief amicus curiae of American Civil Liberties Union filed.
	Nov 12 1999	Brief amicus curiae of Life Legal Defense Foundation filed.
	Nov 12 1999	Brief amicus curiae of AFL-CIO filed.
	Nov 19 1999	CIRCULATED.
	Nov 23 1999	DISTRIBUTED. Motion of Alan Ernest to allow counsel to represent children unborn and born alive (November 24, 1999).
	Nov 23 1999	DISTRIBUTED. Motion of Alan Ernest for leave to file a brief as amicus curiae (November 24, 1999).
	Nov 29 1999	Motion of Alan Ernest to allow counsel to represent children unborn and born alive DENIED.
	Nov 29 1999	Motion of Alan Ernest for leave to file a brief as amicus curiae DENIED.
	Dec 6 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 9 1999	Motion of the Solicitor General for leave to participate

2 pp

No. 98-1856-CSX

Entry	Date	Proceedings and Orders
		in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Dec 10 1999	Brief of respondents Colorado, et al. filed.
	Dec 13 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 13 1999	Brief amici curiae of National Abortion and Reproductive Rights Action, et al. filed.
	Dec 13 1999	Brief amici curiae of New York, et al. filed.
	Dec 13 1999	Brief amici curiae of City of Boulder and City and County of Denver filed.
	Dec 13 1999	Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed.
	Dec 13 1999	Brief amicus curiae of United States filed.
	Dec 29 1999	Reply brief of petitioners Leila J. Hill, et al. filed.
	Jan 19 2000	ARGUED.

Supreme Court, U.S.
FILED

981856 MAY 17 1999

OFFICE OF THE CLERK

No. 98-

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

THOMAS P. MONAGHAN
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thomas Jefferson St., NW
Suite 609
Washington, DC 20007
(202) 337-2273

Attorneys for Petitioners

10PP

QUESTIONS PRESENTED

Under a Colorado criminal law, no one may distribute leaflets, orally counsel, educate or protest, or display signs, within eight feet of another person, while within one hundred feet of the entrance to a medical facility, unless the speaker first seeks and gets consent from the other person. C.R.S. § 18-9-122(3). A speaker commits a crime if he communicates by any of these methods, without consent, while within eight feet of any person to whom the communication is addressed. The following questions are presented:

1. Does Colorado's statutory requirement that speakers obtain consent from passersby on public sidewalks and streets before speaking, displaying signs, or distributing leaflets unconstitutionally burden protected expressive rights in a traditional public forum?

2. Does Colorado's statutory designation of private citizens as censors of speech, picket signs, and leaflets on public streets and sidewalks impose an unconstitutional prior restraint?

3. Is a statute that gives broad discretion to passersby in public places to act as censors of speech, picket signs, and leaflets and which fails to prohibit content-based denials of the right to speak, to display signs, or to pass leaflets subject to strict scrutiny?

4. Is a statute that gives broad discretion to passersby in public places to act as censors of speech, picket signs, and leaflets and which fails to prohibit viewpoint-based denials of the right to speak, to display signs, or to pass leaflets unconstitutional per se?

PARTIES

All of the petitioners are listed in the caption on the cover. None of the petitioners is a corporation. *See* Rule 29.6.

In addition to the respondents listed in the caption on the cover, the following persons or entities were respondents in the proceedings below and are respondents in this Court:

The State of Colorado, Bill Owens, Governor; David J. Thomas, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; The City of Lakewood, Colorado; and, Ken Salazar, in His Official Capacity as Attorney General of the State of Colorado.

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DECISIONS BELOW

The decision of the trial court is unpublished. App. at 30a. The first decision of the Colorado Court of Appeals is published. *See Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995); App. at 38a. This Court's Order, granting the Petition in *Hill v. Colorado*, No. 95-1905, vacating the first decision of the Colorado Court of Appeals, and remanding for further consideration is published. *See Hill v. Colorado*, 519 U.S. 1145 (1997) (Mem.); App. at 47a, 48a. The decision of the Colorado Court of Appeals on remand from this Court is published. *See Hill v. City of Lakewood*, 949 P.2d 107 (Colo. App. 1997); App. at 51a. The decision of the Colorado Supreme Court is published. *See Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999); App. at 1a.

JURISDICTION

The Colorado Supreme Court issued its opinion affirming the judgment of the Colorado Court of Appeals on February 16, 1999. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional and statutory provisions involved in this case are set forth in the Appendix to the Petition: United States Constitution amends. I and XIV § 1; Colorado Revised Statutes § 18-9-122.

STATEMENT OF THE CASE

The Colorado Supreme Court upheld the constitutionality of a statute making it a criminal offense to distribute literature, display picket signs, or orally protest, counsel or educate, in public places, under the circumstances contemplated in the

statute. The court did so despite the statute's direct ban on speech on public streets and sidewalks in Colorado.

C.R.S. § 18-9-122(3) imposes criminal liability on anyone within 100 feet of the entrance door to a health care facility who, without first obtaining permission to do so and while within eight feet of another person, passes a leaflet to, displays a sign to, or directs oral protests, counseling or education to that other person. App. at 65a.

A. Statement of Material Facts

Leila Jeanne Hill, Audrey Himmelmann and Everitt Simpson are "sidewalk counselors" – they offer abortion-bound women alternatives to abortion.[1] They inform passersby on public sidewalks about abortion and abortion alternatives orally, by sign displays, and by leafleting.[2] They make cards, leaflets, and pamphlets,[3] and distribute them near businesses where abortions are performed.[4] They make posters about abortion to display in public.[5] Petitioners have counseled or protested in various places around Colorado.[6]

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1. R. 4, 112-14, 148-49, 151-53. References herein are made to the record transmitted from the Jefferson County District Court to the Colorado Court of Appeals. Those references are indicated as "R.__."

2. R. 4, 112-14, 148-49, 151-53.

3. R. 4, 112-14, 148-49, 151-53.

4. R. 4, 112-14, 148-49, 151-53.

5. R. 4, 112-14, 148-49, 151-53.

6. R. 113, 149, 151-52.

In 1993, the Colorado General Assembly enacted C.R.S. § 18-9-122(3).[7] The statute requires a speaker, whenever he is within 100 feet of the entrance door to a medical facility, to obtain consent from any other person before approaching within eight feet of that person to hand a leaflet, display a sign, or engage in oral education, counseling or protest. App. at 65a. Absent the consent of the audience, speaking, displaying signs, or leafleting are all misdemeanor criminal offenses, as are speaking, displaying signs, or leafleting when consent has been denied. App. at 65a.[8]

Before C.R.S. § 18-9-122(3) was enacted, Petitioners spoke against human abortion on public sidewalks and ways within 100 feet of the entrance doors to abortion facilities.[9] They advised women near abortion businesses about alternatives to abortion. They spoke without fear of censorship,[10] or prosecution.[11]

When C.R.S. § 18-9-122(3) became law, Petitioners stopped or altered their activities out of fear of prosecution. Simpson completely discontinued his expressive activities within 100

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7. The text of the Act is set out in the Appendix to the Petition at 64a-65a.

8. Class 3 misdemeanors in Colorado are punishable by fines of up to one hundred fifty dollars, and imprisonment of up to seven months. C.R.S. § 18-1-106.

9. R. 4, 112-14, 148-49, 151-53.

10. R. 4, 112-14, 148-49, 151-53.

11. R. 4, 112-14, 148-49, 151-53.

feet of abortion facility entrances.[12] Hill and Himmelmann changed their activities to avoid prosecution.[13] These changes have made their efforts more risky, more difficult, and less effective. They have found it impossible, at times, to remain on the sidewalk, keep at least eight feet away from others and continue to speak, display signs or otherwise protest or counsel.[14]

B. Statement on Preservation Below of Federal Questions

The federal questions presented in this Petition have been the central focus of the dispute between the parties and the principal grounds of the decisions below. Petitioners sued in the District Court of Jefferson County, Colorado. Therein, Petitioners asserted that C.R.S. § 18-9-122(3) violated several federal constitutional rights. Petitioners alleged that C.R.S. § 18-9-122(3) violated their constitutional rights to freedom of speech, press, peaceable assembly, due process of law, and equal protection of the laws. *See* Verified Complaint ¶¶ 1, 5(b), 5(d), 56-64, 65-68, 69-73, 74-77, 78-79, *Hill v. Thomas*, No. 93CV1984 (Jefferson County District Court, Colo.).

1. *The trial court's treatment of the federal questions.*

The trial court granted summary judgment for the Respondents. App. at 36a. The trial court put the issues before it this way: "It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment.

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12. R. 153.

13. R. 114, 149.

14. R. 113, 149, 153.

The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed [sic] by the Constitution." App. at 31a. The trial court held, "[t]here is no question that the Plaintiff's conduct implicates First Amendment rights[,]" App. at 31a-32a, and that "[t]he public sidewalks and streets, including the ones that the statute would apply, [sic] constitute 'quintessential' public forum [sic] for First Amendment purposes." *Id.* (discussing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)).

The trial court concluded that C.R.S. § 18-9-122(3) did not regulate speech according to its content or its viewpoint. The court held that, because the statute "applies not only to oral protest but to 'education' and 'counseling[,]'" the statute "applies to all viewpoints, rather then [sic] only certain viewpoints." App. at 49a. The trial court reasoned that the "statute in question applies even-handedly to all speakers and the content of their speech." *Id.* The court also found significant that "[a]ll persons demonstrating are to comply with the statute." *Id.*

The trial court found that C.R.S. § 18-9-122(3) was narrowly tailored because it "targets the offensive and disturbing conduct taking place outside health care facilities[,]" and "[i]t address[es] the exact source of evil it seeks to remedy." App. at 50a. The court also held that C.R.S. § 18-9-122(3) left open ample alternative channels of communication because it only operates within one hundred feet of the entrances to medical facilities and within eight feet of another person. *Id.*

The trial court also held that C.R.S. § 18-9-122(3) is not unconstitutionally overbroad because the statute was not so "sweeping in its scope as to deter both protected and unprotected speech." App. at 34a. Although its terms prohibit

any person from "knowingly approach[ing] another person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," the trial court held that "the statute does not prohibit speech." App. at 35a. The trial court also concluded that the statute was not unconstitutionally vague and that it did not impose a prior restraint on expression. App. at 35a-36a.

2. *The Colorado Court of Appeals' treatment of the federal questions on its initial review*

The Colorado Court of Appeals affirmed. App. at 39a. The appeals court stated, "[t]he principal issue in this appeal is whether [the statute] violates the right to free speech contained in the First Amendment to the United States Constitution." *Id.*

The appeals court concluded that C.R.S. § 18-9-122(3) was content-neutral because it did "not address only the speech of anti-abortion protestors" and "would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant." App. at 42a.

The appeals court found that the statute was "narrowly tailored" and "reasonably necessary to serve a significant government interest" in ensuring "safety and unobstructed access for patients and staff entering and departing from health care facilities." App. at 43a. The appeals court reasoned that ample alternative channels of communication remained open because "posters and signs may be made visible at eight feet[,]" and because "speech can continue at a distance of eight feet or more." *Id.*

The appeals court also concluded that the statute was not unconstitutionally vague, App. at 44a, and that it did not impose a system of prior restraints on expression. App. at 44a-

45a. The appeals court did not answer Petitioners' arguments that C.R.S. § 18-9-122(3) created a viewpoint-based restriction on free speech via its restriction on "oral protest" and the requirement of consent and that the statute was unconstitutionally overbroad.

Petitioners sought rehearing by the Colorado Court of Appeals but the request for rehearing was denied. App. at 60a. The Colorado Supreme Court denied review. App. at 46a.

3. *This Court's treatment of the prior petition*

Petitioners sought review of the appeals court decision in this Court. After deciding *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), this Court allowed the petition, vacated the judgment of the Colorado Court of Appeals, and remanded the case for further consideration in light of the *Schenck* decision. *See Hill v. Colorado*, 519 U.S. 1145 (1997); App. at 47a (order allowing writ); App. at 48a (order vacating judgment below and remanding).

4. *The Colorado Court of Appeals' treatment of the federal issues on remand from this Court*

On remand, the Colorado Court of Appeals again affirmed the trial court's judgment. App. at 52a. The appeals court decided that *Schenck* did not govern this case because *Schenck* involved an injunction whereas the instant case challenges a statute. App. at 55a. Instead, the appeals court applied the standard announced in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "Applying the *Ward* rationale here, we conclude that the statute meets constitutional muster." App. at 56a. Thus, the appeals court held, for the second time, that section 18-9-122(3) did not violate petitioners' First Amendment rights. App. at 57a.

5. *The Colorado Supreme Court's treatment of the federal questions*

Petitioners again sought review in the Colorado Supreme Court, which granted the petition. App. at 58a-59a.[15] The Colorado Supreme Court affirmed. App. at 2a, 29a.

The Colorado Supreme Court identified the state interest supporting C.R.S. § 18-9-122 as the "interest in preserving the health and safety of Colorado's citizens . . . as a means of assuring a citizen's access to medical 'counseling and treatment' at Colorado health care facilities." App. at 9a-10a. This interest was placed in opposition to the constitutional freedoms of speech, press, assembly as the Colorado Supreme Court subjected these expressive rights of the Petitioners to a balancing test. "Here, the fundamental right balanced against the First Amendment rights of petitioners is the right that the General Assembly determined was 'imperative,' a citizen's right of access to 'counseling and treatment' at Colorado medical facilities." App. at 14a (citations omitted). Ultimately, the Colorado Supreme Court concluded that "the First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental

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15. The Colorado Supreme Court limited its review on certiorari to the following question:

> Whether the court of appeals erred in holding that section 18-9-122, 6 C.R.S. (1997), was constitutional upon the United States Supreme Court's remand to the court of appeals to reconsider the statute under *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

App. at 59a. The Colorado Supreme Court specifically denied review "AS TO ALL OTHER ISSUES." *Id.* (emphasis in original).

right, an individual's right to privacy . . . ." App. at 16a.

In the court's view, *Schenck v. Pro-Choice Network* was not dispositive because "*Schenck* involved a judicially created preliminary injunction drawn solely for the parties before the Court" while "section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly . . . ." App. at 16a. Instead, the Colorado Supreme Court decided that "the appropriate test to be applied in this case is found in *Ward v. Rock Against Racism*, 419 U.S. 781 (1989)." App. at 16a.

The Colorado Supreme Court concluded that the statute was narrowly tailored, advanced a significant government interest, and left open ample alternative channels of communication. App. at 24a-29a. "In sum," the court concluded, the statute "represents a fair legislative balancing of the 'right to protest or counsel against certain medical procedures' while protecting 'a person's right to obtain medical counseling and treatment.'" App. at 29a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The challenged statutory provision is functionally similar to the "consent to speak" provision struck down by this Court in *Madsen v. Women's Health Center, Inc.* 512 U.S. 743 (1994). Its operation is indistinguishable on any substantive basis from the zones, struck down in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which "floated" in the public forum. The decision below upholding the challenged

Colorado statute squarely conflicts with the decisions of this Court.

A. The Decision Below Conflicts with this Court's Decisions in *Schenck v. Pro-Choice Network of Western New York* and *Madsen v. Women's Health Center, Inc.*

The challenged statute creates speech-free zones that float in public forum properties and that burden would-be speakers with the duty of obtaining consent before communicating with the public. The court below concluded that such zones were constitutional. The judgment below clearly conflict with this Court's cases.

1. *The Floating Zones*

In *Schenck v. Pro-Choice Network of Western New York, Inc.*, 519 U.S. 357 (1997), this Court struck down the portion of an injunction that created and enforced floating buffer zones near certain abortion businesses. *Id.* at 361. The floating zones were imposed as part of an injunction against anti-abortion activists who allegedly obstructed public passages, engaged in harassing conduct, and otherwise persistently disregarded New York criminal laws. *Id.* at 362-66.[16]

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16. In relevant part, the preliminary injunction provided:

"Defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

"1. Enjoined and restrained in any manner or by any means from:

This Court explained the operation of the floating zones in *Schenck* as follows: "The floating buffer zones prevent defendants--except for two sidewalk counselors, while they are tolerated by the targeted individual--from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id.* at 377. This Court concluded that the imposition of these floating zones constituted a "broad prohibition, both because of the type of speech restricted and the nature of the location." The expressive activities affected by the injunction included "[l]eafleting and commenting on matters of public concern [which] are classic forms of speech that lie at the heart of the First Amendment . . . ." 519 U.S. at 377. The restrictions

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. . .

"(b) demonstrating . . . fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

"(c) . . . sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. . . ."

Id. at 376.

operated "in public areas" where speech "is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Id.* (citation omitted).

Despite the "record of abusive conduct[,]" this Court concluded that, since the "broad speech prohibition 'float[ed]'" it was "unsustainable on th[e] record." *Id.* at 377.

Here, C.R.S. § 18-9-122(3) creates floating speech-free zones that restrict speech in the public forum. Yet, the Colorado Supreme Court upheld the constitutionality of just such zones.

2. *The Consent Requirement*

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court struck down a substantially similar restriction on speech outside a Florida abortion business. The injunction in *Madsen* ordered protesters to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 512 U.S. at 773.

This Court decided that the restriction was overbroad: "it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* (emphasis in original). This Court held that, unless such a restriction is limited to speech that either is "independently proscribable," such as "'fighting words' or threats," "or is so infused with violence as to be indistinguishable from a threat of physical harm," such a "provision cannot stand." *Id.*

C.R.S. § 18-9-122(3) is not limited to proscribable speech.

It restricts peaceful, nonthreatening "oral protest," "education," "counseling," sign displays and leafleting. The lower courts declined to construe the statute otherwise. C.R.S. § 18-9-122(3) does not target precisely proscribable evils; the statute restricts *all* attempts to communicate with *any* person in those public places within the scope of the statute. The statute does not regulate *only* contact between speakers and patients or employees of medical facilities (though this still would be overbroad). Instead, anyone who is walking down a public street, within 100 feet of the entrance door to a medical facility, is given the power to restrict whether anyone else may speak, leaflet, or display signs. This Court's decision in *Madsen* is dispositive in invalidating such "consent to speak" requirements; the court below failed to obey the teaching of *Madsen*.

In *Madsen*, this Court reaffirmed "'that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" 512 U.S. at 774 (citation omitted). This Court declared: "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.*

Another section of the Colorado statute at issue directly prohibits obstructive conduct. *See* App. at 65a; C.R.S. § 18-9-122(2) (section prohibiting "knowingly obstruct[ing], detain[ing], hinder[ing], imped[ing], or block[ing] another person's entry to or exit from a health care facility"). The section challenged by Petitioners prohibits only speech. Even though C.R.S. § 18-9-122(3) "burdens more speech than is necessary to prevent intimidation and to ensure access" to

Colorado medical facilities, the court below found no constitutional infirmity in it. The decision below directly conflicts with this Court's decision in *Madsen* rejecting the imposition of a "consent to speak" requirement.

3. *Overbreadth*

In *Madsen*, this Court struck down the injunctive "bubble zone" because it restricted "*all* uninvited approaches . . . regardless of how peaceful the contact may be," 512 U.S. at 774, and it "burden[ed] more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* In a word, the consent provision was overbroad. The court below, however, concluded here that C.R.S. § 18-9-122(3) was not overbroad, despite the functional similarities between the injunctive zones in *Madsen* and the speech-restrictive zones created by C.R.S. § 18-9-122(3).

B. The Decision Below Conflicts with this Court's Decisions Regarding the Standard of Review for Content- and Viewpoint-Based Restrictions on Speech.

1. *Content-based restrictions on speech*

This Court has long held that content-based legislative restrictions on speech in traditional public fora are subject to the strictest scrutiny. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760-61 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-85 (1992); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115-18 (1991); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Boos*

v. Barry, 485 U.S. 312, 321 (1988); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1987); *Carey v. Brown*, 447 U.S. 455, 460-63 (1980). In those decisions and others, this Court has explained that enactments are content-based when they embody direct restrictions on the content of speech *or* when they are crafted to allow restrictions on speech to be levied because of audience reactions to speech. C.R.S. § 18-9-122(3) is just such a statute.

In accord with this Court's decisions, the appropriate standard of review to have been applied to C.R.S. § 18-9-122(3) was the strict scrutiny applied routinely in cases of content-based governmental regulations of speech. C.R.S. § 18-9-122(3) burdens certain classes of oral utterance. It restricts oral *protest*, oral *education*, and oral *counseling*, and leaves unaffected other oral utterances. Consequently, the question of whether consent will be required to speak depends first on the content of the contemplated communication. If the words do not constitute protest, education, or counseling, consent is not needed. C.R.S. § 18-9-122(3) clearly targets only speech and expressive conduct, and its restrictions are plainly hinged on the content of speech.

Moreover, the statute subjects speech in public places to a requirement of consent. The statute does not prohibit citizen-censors from withholding their consent on the basis of their disagreement with, or disapproval of, the content of expression. Thus, the challenged statute is also content-based in this respect.

Nonetheless, the court below rejected this Court's repeated instruction to subject such a restriction to strict scrutiny. Instead, the court below analyzed C.R.S. § 18-9-122(3) under the more lenient standard of review for *content-neutral* regulations of time, place, or manner of expression. App. at 6a-

7a.

The choice of standards by the lower courts directly conflicts with this Court's decisions.

2. *Viewpoint-based restrictions on speech*

This Court has held that viewpoint-based restrictions on expression are unconstitutional, even in nonpublic fora. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-94 (1993) (citing cases). C.R.S. § 18-9-122(3) limits the right to speak in public places by imposing a requirement of consent to speak. The statute, however, does not cabin the discretion of citizen-censors who may withhold consent to would-be speakers based on disagreement with the viewpoints expressed. Nonetheless, the Colorado Supreme Court affirmed the constitutionality of the challenged statute.

C. The Decision Below Conflicts with this Court's Decisions on Prior Restraints of Speech.

An obligation to get permission from others before displaying a sign, passing a leaflet, or engaging in oral protest, education or counseling, is a prior restraint on free expression. C.R.S. § 18-9-122(3) is such a restraint. The statute fails constitutional scrutiny as such because it conveys unbridled discretion to those from whom a speaker must obtain consent to speak, because it imposes no time limits on the decision-maker, and because it provides none of the familiar, constitutional safeguards required by the Constitution in a system of prior restraint.

1. *Unbridled discretion*

This Court has said, "speakers need not obtain a license to speak." *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988). Regarding prior restraints, this Court has said, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of B.rmingham*, 394 U.S. 147, 150-51 (1969).[17] The right to be free from such previous restraints on expression is so important, this Court has said, that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Id.* at 151.

C.R.S. § 18-9-122(3) completely omits such standards. Instead, it deputizes the audience of any speech within 100 feet of medical facilities as censor with unbridled and unreviewable discretion. That the censor is a private party and not a government official is no more relevant here, *contra* App. at 45a, 52a, than it would be in a statute that subjected speech in public parks to the consent of other park-goers or subjected the showing of films in a theater to a private review board. The specter of such censorship inevitably induces *self*-censorship in

17. The problem of unbridled discretion in a scheme of prior restraints has been unambiguously expounded in an extended line of this Court's decisions. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth*; *Secretary of State v. Jos. H. Munson Co.*, 467 U.S. 947 (1984).

speakers who seek to communicate in traditional public forum properties. *Lakewood*, 486 U.S. at 757.

2. *No time limits for decision-making*

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court reiterated the rule that "the failure to place limitations on the time within which a censorship board decisionmaker must make a determination . . . is a species of unbridled discretion." *Id.* at 223 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)). In *Riley*, this Court struck down a speech licensing scheme that failed to impose such time limitations. The lack of a time limitation was unconstitutional because, in such circumstances, "delay compel[led] silence." *Riley*, 487 U.S. at 802.

C.R.S. § 18-9-122(3) likewise does not set any limit on the time within which private citizens must act on requests for permission. Obviously, the time to address or hand a leaflet to a person en route to a building is fleeting. Here, as in *Riley*, delay in responding to an application for permission to speak compels silence.

3. *No procedural safeguards*

In *Freedman*, 380 U.S. at 58-60, this Court identified three procedural safeguards necessary to "obviate the dangers of a censorship system." 380 U.S. at 58. Those safeguards included burdening the censor with proving that the suppressed film was unprotected, *id.*, requiring the censor to obtain a judicial determination of whether the suppressed film constituted protected expression, *id.*, and limiting the denial of a license to "the shortest fixed period compatible with sound judicial resolution," *id.* at 59.

C.R.S. § 18-9-122(3) omits each of the procedural safeguards

identified in *Freedman* as essential in a system of prior restraints on speech to avoid facial constitutional invalidation.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF FEDERAL COURTS OF APPEALS AND A STATE COURT OF LAST RESORT.

A. Conflict with the United States Court of Appeals for the Ninth Circuit

On remand from this Court, the United States Court of Appeals for the Ninth Circuit struck down a similar "floating bubble zone" scheme imposed by an ordinance[18] of the City of

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18. The Phoenix Ordinance provided:

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For purposes of this section:

1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities.

3. "Health care facility" means any hospital, clinic, office, building or other place used to provide medical, psychological, nursing or other health care services, including family planning counseling and pregnancy-related services.

C. For purposes of this section, distance shall be measured from that

Phoenix, Arizona. *See Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), *on remand from Sabelko v. City of Phoenix*, 519 U.S. 1144 (1997) (mem.). The Ninth Circuit reached its conclusion in light of this Court's decision in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). The Ninth Circuit stated: "floating buffer zones prevent leafleting and communication at a normal conversational distance, both 'classic forms of speech that lie at the heart of the First Amendment.'" *Sabelko*, 120 F.3d at 165 (citation omitted). The Ninth Circuit noted that, in *Schenck*, a "lack of certainty about how to comply with the injunction created a substantial risk that more speech would be burdened than the injunction prohibited." 120 F.3d at 165. The Ninth Circuit concluded, "[b]ecause other means might exist which would protect governmental interests and provide certainty regarding compliance, the Court held that the floating buffer zones burdened more speech than was necessary." *Id.*, at 165.

Applying *Schenck*, the Ninth Circuit determined:

> The Phoenix ordinance suffers the same defects as the injunction in Schenck. It contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance. An individual within the access area to a clinic can invoke the eight-foot floating buffer zone, effectively preventing handbilling and normal

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part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. The term "body" includes any natural or artificial extension of a person's body including but not limited to an outstretched arm or a hand-held sign.

Sabelko v. City of Phoenix, 120 F.3d 161, 163 (9th Cir. 1997).

> conversation. Demonstrators who attempt communication with an individual must constantly monitor themselves to ensure that they don't encroach upon that individuals's or another individual's floating buffer zone. Further, the demonstrators are faced with the problem of determining which people within the access area have invoked the protection offered by the buffer zone.

Sabelko, 120 F.3d at 165.

The Phoenix Ordinance could be upheld as narrowly tailored, the *Sabelko* court only said, "'if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.'" 120 F.3d at 165 (citations omitted). In this respect, "a Phoenix demonstrator would encounter difficulty in knowing how to remain compliant. This uncertainty concerning compliance establishes a substantial risk that more speech will be eliminated than the ordinance itself prohibits." *Id.* Consequently, the *Sabelko* court concluded, "the Phoenix ordinance lacks the narrow tailoring necessary to survive our scrutiny." *Id.*[19]

To the contrary, the Colorado Supreme Court here concluded that C.R.S. § 18-9-122(3) was narrowly tailored.

If anything, the Colorado statute is more obviously unconstitutional than the Phoenix ordinance invalidated in *Sabelko*. The Phoenix zones only became operative when "invoked," *Sabelko*, 120 F.3d at 163, but the Colorado zones are automatic, C.R.S. § 18-9-122(3). In other words, within 100 feet of a Phoenix medical facility, a speaker could approach

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19. The *Sabelko* court had no occasion to decide whether the Ordinance left open ample alternative channels of communication because it had concluded the Ordinance was not sufficiently narrowly tailored.

within 8 feet of another for purposes of handing a leaflet, engaging in oral advocacy, or displaying signs at least until the audience expressed a veto on the speech. In Colorado, however, within 100 feet of the entrance door to a podiatrist's office, a speaker dare not approach within 8 feet of another for the same expressive purposes, without *first* obtaining consent from the audience. The Ninth Circuit rejected the legislative imposition of floating bubble zones in traditional public fora. The court below affirmed the legislative creation of such zones, in reasoning directly in conflict with the decision of the Ninth Circuit.[20]

B. Conflict with the United States Court of Appeals for the Eighth Circuit

The decision below directly conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in *United Food and Commercial Worker's Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988). In *IBP*, the Eighth Circuit affirmed a district court decision holding unconstitutional a Nebraska statute that provided,

> [a] person commits the offense of unlawful picketing if . . . he interferes, or attempts to interfere, with any other person in the exercise of his or her lawful right to work . . . by . . . persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such

20. After *Sabelko*, and in light of that decision and this Court's decision in *Schenck*, the United States Court of Appeals for the Ninth Circuit affirmed the grant of injunctive relief against a similar floating bubble zone ordinance imposed and enforced by the City of Santa Barbara, California. *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1217 (9th Cir. 1998), *cert. denied*, 119 S. Ct. ____ (1999).

purpose.

Neb. Rev. Stat. § 28-1317(1)(a) (1985) (quoted at 857 F.2d at 426). The Nebraska statute enforced a presumption that unwelcome words are unprotected. The court of appeals rebuffed that concept: "[t]hat the speech is unwelcome does not deprive it of protection." 857 F.2d at 432 (citations omitted).

Under the Nebraska statute, no consent to speak was required before communications were initiated, *see* Neb. Rev. Stat. § 28-1317(1)(a) (1985). C.R.S. § 18-9-122(3) does not even contain that extremely minimal limitation: the statute prohibits not only persistent communication, but also mere initiation of communication without consent. The decision sustaining the constitutionality of C.R.S. § 18-9-122(3) cannot be reconciled with the judgment of the Eighth Circuit in *IBP*.[21]

C. Conflict with the North Dakota Supreme Court

The decision below directly conflicts with the North Dakota Supreme Court's decision in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 411

21. The decision below — affirming the constitutionality of a statute that "makes a crime out of what under the Constitution cannot be a crime" and that is "aimed directly at activity protected by the Constitution," *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) — is also inconsistent with a decision of the United States Court of Appeals for the Fourth Circuit in *NOW v. OR*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd in part on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In *NOW*, the Fourth Circuit affirmed a district court's order *refusing* to "broaden the scope" of an injunction "to include activities that tend to 'intimidate, harass or disturb patients or potential patients' because to do so would risk enjoining activities clearly protected by the First Amendment." 914 F.2d at 586.

(N.D. 1992).

In *Lambs of Christ*, the North Dakota Supreme Court struck down the provision of an injunction that prohibited "'speaking to staff and patients . . . who indicate that they do not wish to be spoken to'" and "'distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature.'" 488 N.W.2d at 407 n.1 (setting out provisions of injunction). Regarding the prohibitions on speaking and on distributing literature after a person expresses a wish not to receive it, the North Dakota Supreme Court held that "'speaking' to staff and patients cannot be constitutionally enjoined," *id.* at 411, and that "distributing literature is protected communicative activity" for which a complete ban would be inappropriate under the First Amendment, *id.*

In Colorado, however, leafleting, showing a sign or "speaking" *to anyone* who does not consent to be spoken to subjects a person to criminal prosecution, at least when such "speech" constitutes "oral protest, education or counseling" under the circumstances set forth in C.R.S. § 18-9-122(3). The decision below cannot be reconciled with the decision of the North Dakota Supreme Court in *Lambs of Christ*.

III. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

C.R.S. § 18-9-122(3) preconditions free speech, free press and peaceable assembly on a requirement of consent from passersby. The statute directly restricts activities entitled to substantial constitutional protection. While purporting to serve the State's interest in securing access to medical facilities, the

statute does not regulate obstructive activities, trespass, assaults or the use of threatening language. Instead, the statute is crafted in a way that reveals the State's true interest: suppressing free speech. C.R.S. § 18-9-122(3) prohibits speech, without a close fit between such expressive activities and the asserted interest of Colorado in insuring free access to medical facilities.

Colorado has codified a principle—audience veto power—which other communities might well wish to duplicate. For example, in Illinois, the residents of the Village of Skokie would have been able to prevent uniformed neo-Nazis from marching down that Village's streets. *Cf. National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). In Cummings, Georgia, if those city residents who lined the street to protest against it had been deputized to decide the question, that city would never have played host to the largest civil rights demonstration in the South since the 1960s. *Cf. Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992). And in Colorado, the State could cripple the initiative process by banning circulators from approaching qualified voters absent advance consent. *Cf. Meyer v. Grant*, 486 U.S. 414 (1988).

Colorado has not been alone in its use of speech-free "bubble zone" to restrict freedom of speech in the public forum. Since Colorado's enactment of C.R.S. § 18-9-122(3), the City of Phoenix, Arizona, enacted a similar provision under its city ordinances. That ordinance, however, has been declared unconstitutional and its enforcement has been enjoined. *See Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). The City of Santa Barbara, California, adopted a similar restriction. It, too, has been declared unconstitutional. *See Edwards v. City*

of Santa Barbara, 150 F.3d 1213 (9th Cir. 1998). These legislative enactments all disregard this Court's direct holding in *Madsen* on the unconstitutionality of "requirement of consent" provisions and this Court's direct holding in *Schenck* on the unconstitutionality of floating speech-free zones.

C.R.S. § 18-9-122(3) is a model for legislative enshrinement of the audience veto. It works incalculable injury to the rights of freedom of speech, freedom of the press, and freedom of assembly. The decision below, accepting and affirming government enforcement of private citizens' rights to veto expressive activities in public places, is inconsistent with the First and Fourteenth Amendments.

Just as troubling is the facile manner by which the Colorado Supreme Court has distorted this Court's decisions *Madsen* and in *Schenck* into a license to subject a facially overbroad, content-based, viewpoint-discriminatory statute to the very modest standard of review applicable to content-neutral, reasonable regulations of time, place and manner. This Court did not hold, in either *Madsen* or *Schenck*, that the consent requirement or the floating zones — which were unconstitutional even when limited to the context of an injunction against adjudged malefactors — would be constitutional if imposed by statute upon the general populace. The decisions below, however, assume just such a distorted approach to determination of the constitutional questions presented here.

CONCLUSION

The decisions below directly conflict with this Court's precedents, with decisions of the Eighth and Ninth Circuit Courts of Appeals, and with a decision of the North Dakota

Supreme Court. Moreover, the decision below distorts the jurisprudence governing the rights to freedom of speech, press, peaceable assembly, due process, and equal protection.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS P. MONAGHAN
NEW HOPE LIFE CENTER, ACLJ—NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 609
Washington, DC 20007
(202) 337-2273

Attorneys for Petitioners

May 17, 1999

APPENDIX

[Appendix A]

SUPREME COURT, STATE
OF COLORADO
No. 97SC630

February 16, 1999

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR., Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; KEN SALAZAR, in his official capacity as Attorney General of the State of Colorado; and THE STATE OF COLORADO, BILL OWENS, Governor, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

Roger W. Westlund,
Thornton, Colorado
The American Center for Law & Justice
Jay Alan Sekulow
Lawrenceville, Georgia
James Matthew Henderson, Sr.
Washington, D.C.

Attorneys for Petitioners

No appearance on behalf of David J. Thomas, District Attorney for the First Judicial District of the State of Colorado

Ken Salazar, Attorney General
Barbara McDonnell, Chief Deputy Attorney General
Michael E. McLachlan, Solicitor General
Patricia S. Bangert, Director of Legal Policy

Carol D. Angel, Senior Assistant Attorney General
Natural Resources Section
Denver, Colorado

Attorneys for Ken Salazar and State of Colorado

Gorsuch Kirgis L.L.C.
Roger W. Noonan
Maureen Herr Juran
Denver, Colorado

Attorneys for City of Lakewood

Planned Parenthood of the Rocky Mountains, Inc.
Kevin C. Paul
Denver, Colorado

Attorneys for Amici Curiae Planned Parenthood of the Rocky Mountains, Inc., and the Center for Reproductive Law & Policy, Inc.

City Attorney
Joseph N. de Raismes
Boulder, Colorado

Attorney for Amicus Curiae, City of Boulder

Justice SCOTT delivered the Opinion of the Court.

In this case we must decide whether a legislative enactment designed to protect the privacy rights of citizens entering and leaving Colorado health care facilities unduly burdens the First Amendment rights of other citizens. We conclude that it does not.

We granted certiorari in Hill v. City of Lakewood, 949 P.2d 107 (Colo.App.1997), to determine whether a Colorado statutory provision, in particular, section 18-9-122(3), 6 C.R.S. (1998), can withstand scrutiny under a facial First Amendment challenge. Section 18-9-122(3) provides "[n]o person shall knowingly approach another person within eight feet of such

person, unless such other person consents, for the purpose of ... counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility." In light of the order of remand by the United States Supreme Court to the Colorado Court of Appeals, our review is necessarily informed by the Supreme Court's opinion in Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).[1] Nonetheless, we rely upon the standard announced in Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In doing so, while recognizing that the statute creates a limited floating buffer zone, we hold that, on its face, the statute does no more than place reasonable restrictions on speech that (1) are content-neutral; (2) are narrowly tailored to serve a significant government interest; and, (3) leave open ample alternative means for the communication of information petitioners seek to place into the marketplace of ideas. We so conclude because the standard announced in Ward permits greater deference for legislative enactments regulating speech than the Schenck standard, which places greater limitations upon the judicial regulation of speech through injunctive proceedings. We therefore uphold the statute against petitioners' facial attack and affirm the judgment of the court of appeals.

I.

Petitioners, Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr. (petitioners) filed a declaratory

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1. The issue upon which we granted certiorari was:

Whether the court of appeals erred in holding that section 18-9-122, 6 C.R.S. (1997), was constitutional upon the United States Supreme Court's remand to the court of appeals to reconsider the statute under Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

judgment action and requested injunctive relief in Jefferson County District Court (trial court) under a facial challenge[2] to section 18-9-122(3), alleging that it violated the First Amendment and was therefore unconstitutional. Respondents, David J. Thomas in his official capacity as District Attorney for the First Judicial District of the State of Colorado, the City of Lakewood, and other officials of the State of Colorado,[3] (collectively, the State) filed a motion for summary judgment, asserting that section 18-9-122(3) was lawful as a constitutional time, place, and manner regulation of speech under the First Amendment to the United States Constitution. Petitioners filed a cross-motion for summary judgment alleging that section 18-9-122(3) was (1) facially unconstitutional as a prior restraint; (2) a content-based restriction lacking justification; and (3) unconstitutionally overbroad and vague.

In granting the State's motion for summary judgment, the trial court applied the standard set forth by the United States

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2. Petitioners' complaint alleged the statute was unconstitutional under both a facial and an as-applied challenge. However, as the statute had not yet been enforced, the trial court correctly ruled that the challenge was facial only. See High Gear & Toke Shop v. Beacom, 689 P.2d 624, 628 (Colo.1984). Therefore, our review here is limited to reviewing the facial challenge.

3. When originally filed, Gale Norton, as Attorney General, and Roy Romer, as Governor, were officers of the state of Colorado, sued in their official capacities. However, in January 1999, Bill Owens and Ken Salazar succeeded to the offices of Governor and Attorney General. Hence, by operation of law they are nominal parties in this proceeding, representing the State of Colorado in their official capacities only. See C.A.R. 43(c)(1) ("When a public officer is a party to an appeal or other proceedings in the appellate court in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party.").

Supreme Court in Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Applying that standard, the trial court found that section 18-9-122(3) was content-neutral, was narrowly tailored to serve a significant governmental interest, and left open ample alternative means of communication.

Petitioners appealed to the court of appeals, which affirmed the trial court's ruling. See Hill v. City of Lakewood, 911 P.2d 670 (Colo.App.1995) (Hill I). They then sought review in this court, which we denied. After the United States Supreme Court announced its decision in Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997), petitioners obtained review by petition to our nation's high court. Without an opinion, however, the United States Supreme Court vacated the judgment of the court of appeals in Hill I, and remanded the case to the court of appeals for reconsideration in light of Schenck. See Hill v. Colorado, 117 S.Ct. 1077 (1997).

On remand, the court of appeals determined that the test announced in Schenck was not applicable, and applied the standard announced by the Supreme Court in Ward. "Applying the Ward rationale here, we conclude that the statute meets constitutional muster." Hill v. City of Lakewood, 949 P.2d 107, 109-10 (Colo.App.1997) (Hill II). Thus, the court of appeals once again held that section 18-9-122(3) did not violate petitioners' First Amendment rights. See id. at 110.

We granted certiorari to review the important First Amendment issues raised by the judgment of the court of appeals. We now affirm that judgment.

II.

Shortly before 1993, many citizens seeking medical counseling and treatment at Colorado health care facilities were openly subjected to verbal abuse and on occasion, were physically assaulted while entering or leaving health care

facilities. Confronted by these threats to public safety and open, hostile, and sometimes violent confrontations in public places, the Colorado General Assembly held public hearings to determine the nature and extent of the danger posed by such acts to public safety. As a consequence of the testimony of several witnesses that revealed widespread, violent confrontations, the General Assembly undertook to develop a statute intended to acknowledge a citizen's "right to protest" or counsel against certain medical procedures while assuring that government protects a "person's right to obtain medical counseling and treatment." § 18-9-122(1), 6 C.R.S. (1998).

A.

In 1993, the General Assembly enacted section 18-9-122, entitled "Preventing passage to and from a health care facility--engaging in prohibited activities near facility" as part of Colorado's criminal code.[4]

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4. Comprised of six subsections, section 18-9-122 provides:

(1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

In subsection 18-9-122(1), the General Assembly set forth the public health considerations of "access to health care facilities," which it characterized as "imperative" for Colorado's citizens. "Balanc[ing]" the right to protest or counsel against certain medical procedures with another person's right to obtain medical counseling and treatment, the Colorado legislature sought to prohibit anyone from "knowingly obstructing another person's entry to or exit from a health care facility." § 18-9-122(1). Subsection 18-9-122(2) expressly classifies conduct by which a person "knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exist from a health care facility" as a "class 3 misdemeanor."[5] § 18-9 122(2).

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(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

5. The penalty for committing a class 3 misdemeanor is a fine between fifty and one hundred fifty dollars, and up to seven months

Subsection 18-9-122(3), which is at issue here, creates a 100-foot radius zone around a health care facility, as a "fixed buffer zone." Within that fixed buffer zone only, no person may knowingly approach another within eight feet for the purpose of displaying a sign, engaging in oral protest, educating, counseling, or passing leaflets or handbills, unless the other person consents to such an approach. This eight-foot radius zone we call a "limited floating buffer zone."[6]

Section 18-9-122 was enacted by the General Assembly in response to concerns regarding open access to health care counseling and treatment at Colorado health care facilities. While the legislation was pending, the Colorado House and Senate Judiciary Committees heard testimony regarding abortion opponents' conduct at abortion clinics, including physically blocking entrances, intimidation, and harassment of individuals seeking services. A nurse practitioner who works at a clinic which provides, in part, abortion counseling and services, testified that anti-abortion protestors:

> yell, thrust signs in faces, and generally try to upset the patient as much as possible, which makes it much more difficult for us to provide care in a scary situation anyway . . . We have had to place security doors where there is [sic] double locks. People have to be rung in. Each

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imprisonment. See § 18-1-106, 6 C.R.S. (1998).

6. While the statute creates a floating buffer zone, we take care to make clear the following. The statute's limited floating buffer zone exists only within the 100 foot fixed buffer zone that protects entrances to health care facilities. Hence, there is no limitation placed upon a citizen's First Amendment conduct under the questioned statute outside the fixed buffer zone or more than 100 feet from the entrance. Thus, so long as a person intending to enter or exit a health care facility is more than 100 feet from the entrance, individuals exercising their First Amendment rights may engage in speech within eight feet of the person using the health care facility.

> of the doors, we have magnetic locks that slide because we have had our locks glued shut. We have had bicycle locks placed over handles so that we have had to remove some of the handles on the doors.

Hearings on H.B. 93-1209 Before the House Judiciary Committee, 59th General Assembly, 1st Reg. Sess. (Audio Tape 93-8, Feb. 12, 1993, at 7:42 a.m.). Another witness, a volunteer who escorts patients into and out of abortion clinics because of the harassment those patients face from anti-abortion protestors, testified that as patients are entering the clinic:

> the protestors are yelling and screaming. They are flashing their bloody fetus signs. They are yelling, "you are killing your baby." They are yelling at us as escorts that we are guards from Dachau [World War II Nazi concentration camp utilized to commit atrocities against people of Jewish ancestry] . . . they are talking about fetuses and babies being dismembered, arms and legs torn off . . . A young black woman came for services yesterday. They called her "mammy."

Id. This same witness testified that:

> a mother and her daughter had not heard the instructions from the clinic [to park in the parking lot] . . . They parked on the street. [While walking towards the clinic], they were immediately surrounded and yelled at and screamed at . . . The young woman was in tears . . . The mother looked at me and said, "I can't believe this happens in this country . . . my daughter was raped."

Id.

Testimony from various witnesses was compelling. With such a legislative history, it is obvious, and petitioners do not refute, that the General Assembly's actions were motivated by its interest in preserving the health and safety of Colorado's

citizens. In particular, the General Assembly enacted section 18-9-122 as a means of assuring a citizen's access to medical "counseling and treatment" at Colorado health care facilities.

B.

Petitioners are self-titled "sidewalk counselors."[7] "Sidewalk counselors" engage in efforts to educate, dissuade, inform and advise individuals about abortion and abortion alternatives. To accomplish these goals, petitioners utilize verbal communication, placards printed with anti-abortion statements and/or photographs, leaflets, and various other demonstrative devices, including plastic replicas of fetuses at various stages of development. The term "sidewalk" refers to petitioners' practice of performing these activities while standing on sidewalks and roadways outside health care facilities that provide abortion counseling, services, and procedures. Petitioners attempt to engage individuals entering the health care facility in conversation in order to dissuade those individuals from entering the facility and, presumably, obtaining abortions.

Petitioners argue that the Supreme Court's opinion in Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997), and its progeny, including Sabelko v. City of Phoenix, 120 F.3d 161 (9th Cir.1997), control. As a

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7. Although the legislative history of section 18-9-122 attributes intimidating and violent conduct to anti-abortion protestors generally, we assume, for purposes of this facial challenge to the statute, that petitioners have not engaged in, and do not intend to engage in, such dangerous and harassing conduct. We further note that instances of violence, including bombings of abortion clinics and other life threatening violence perpetrated against doctors and other medical personnel who provide abortion counseling and services, are not speech but, rather, constitute illegal conduct not protected by the First Amendment.

consequence, they argue, section 18-9-122(3) unconstitutionally restricts their First Amendment rights to protest outside of abortion clinics. In doing so, however, petitioners concede that the test for a time, place, and manner restriction is the appropriate measure of this statute's constitutionality. See Tape Recording of Oral Argument, Oct. 19, 1998, statement of James M. Henderson, Esq. Petitioners argue that pursuant to the test announced in Ward, the "floating buffer zone" created by section 18- 9-122(3) is not narrowly tailored to serve a significant government interest and that section 18-9-122(3) does not provide for ample alternative channels of communication. We disagree.

III.

Before addressing the petitioners' argument that their First Amendment rights have been abridged, we discuss the nature of petitioners' First Amendment rights. Then, we also review the "imperative" interest the General Assembly acted to serve, the fundamental right of privacy, access to medical counseling and treatment, against which petitioners' First Amendment rights must be balanced in this case.

A.

Repeated so often in our jurisprudence that we know it by rote, the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I.[8]

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8. By force of the Civil War Amendments, in particular the Fourteenth Amendment, the First Amendment applies to the states via the Due Process Clause of the Fourteenth Amendment. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n. 1, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 99, 538 P.2d 450, 457 (1975), overruled on other grounds by Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1106 (Colo.1982). " 'The freedom of speech ... [is] among the

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . .

Red Lion Broad. Co. v. Federal Communications Comm'n, 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). "If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating....' " Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530, 537-538, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96; 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)). It is this very fundamental right, and its full and free exercise, that requires that government permit open debate.

The First Amendment contemplates that ideas will be tested in the marketplace, and not scrutinized by government censors. With a view towards its egalitarian nature, empowering even the least powerful among us, some view "the 'central meaning' of the First Amendment [as being] equality."[9] Laurence H.

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fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.' " Burson v. Freeman, 504 U.S. 191, 196, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (quoting Thornhill v. Alabama, 310 U.S. 88, 95, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)).

9. This egalitarian nature of the First Amendment was evinced by the Civil Rights Era of the 1950's through the 1970's including (1) peaceful demonstrations and marches, some of which were lead by Rev. Dr. Martin Luther King, Jr., and (2) the work of the NAACP and the NAACP Legal Defense Fund, Inc., among others. See NAACP v. Claiborne Hardware, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215

Tribe Constitutional Choices 188 (1985) (quoting Kenneth Karst, "Equality as a Central Principle in the First Amendment" 43 U. Chi. L.Rev. 20, 21 (1975)).

The First Amendment, in effect, limits the choices government may make in its efforts to regulate or prohibit speech. See Consolidated Edison Co. of New York, Inc., 447 U.S. at 537-38 ("governments must not be allowed to choose which issues are worth discussing or debating").

However, the First Amendment is not an absolute prohibition and does not bar all government attempts to regulate speech. See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 770, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (holding that an injunction establishing a thirty-six foot buffer zone around abortion clinic entrances does not violate protestor's First Amendment rights); see also People v. Baer, No. 97SA426, slip op. at 16 (Colo. Jan.25, 1999) (upholding conviction for harassment by stalking and noting that at least forty-eight states have enacted similar statutes). This is, perhaps, especially true when the questioned government action results from a particularly difficult reconciliation or "accommodation" of the right of free speech with another right fundamental in our constellation of rights. See Burson v. Freeman, 504 U.S. 191, 210, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992); Berring v. SHARE, 106 Wash.2d 212, 721 P.2d 918, 920 (Wash.1986) ("No judicial task is more difficult than balancing the constitutional

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(1982) (boycott seeking desegregation of public facilities, improved government services in black neighborhoods, and hiring of African Americans as police officers, social workers, and store clerks upheld against state tort laws). Influenced by Ghandi's philosophy of nonviolence, Dr. King led nonviolent demonstrations that helped lead to the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. A recipient of the Nobel Peace Prize, Dr. King was felled by the violence of an assassin's bullet. Dr. King's birthday is a national holiday observed in Colorado and throughout the United States.

rights and freedoms of citizens of this country against conflicting rights and freedoms of their fellow citizens."). It is this reconciliation or effort to accommodate the fundamental right of privacy in section 18-9-122(3) that is before us today.

B.

Here, the fundamental right balanced against the First Amendment rights of petitioners is the right that the General Assembly determined was "imperative," a citizen's right of access to "counseling and treatment" at Colorado medical facilities. At least one court has recognized that "the same constitution that protects the [anti-abortion protestors'] right to free speech also protects the [clinic's] right to abortion services and the patients' rights to receive those services." Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir.), cert. denied, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989) (holding that anti-abortion protestors could be liable for violations under federal Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1964(c)). "The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." Madsen, 512 U.S. at 772-73.

The right to privacy was first recognized by Justice Brandeis in 1890 in an article he co-authored with Samuel D. Warren describing it as "the right to be let alone." Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L.Rev. 193, 214-18 (1890). Justice Brandeis later expanded that statement when he explained that, "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized [individuals]." Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), rev'd on other grounds, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The Supreme Court has recognized the right to privacy as one existing under the "penumbras" emanating from several

different provisions contained within our federal constitution's Bill of Rights, specifically the First, Third, Fourth, Fifth, and Ninth Amendments, as well as the Fourteenth Amendment. See Griswold v. Connecticut, 381 U.S. 479, 484-85, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). In Eisenstadt v. Baird, the Supreme Court explained that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (holding that a ban on distribution of contraceptive devices to unmarried persons violated the Equal Protection Clause); see also Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (holding that statute directing involuntary sterilization on criminal defendant violated Equal Protection Clause, since "[m]arriage and procreation are fundamental to the very existence and survival of the race").

In Roe v. Wade, the Supreme Court held that the fundamental right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In so doing, the Court recognized the potential harm to those exercising this right due to unwarranted interference by others. See id. The Court concluded that, because of the extensive history of the right to privacy and because of its support in our Constitution and case law, only a compelling reason would justify government interference with its exercise. See id. at 155-56.

In consideration of the foregoing fundamental rights, we therefore take great care in reviewing government action challenged as impermissible under the First Amendment. However, we conclude that the First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental right, an individual's right to privacy, here represented by access to

medical counseling and treatment.

IV.

We turn now to the principal issue upon which this case will be resolved: Whether section 18-9-122(3) is constitutional in light of the United States Supreme Court's decision in Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). We conclude that the test used to determine the constitutionality of the injunction imposed in Schenck is inapplicable to the instant case. We further conclude that the appropriate test to be applied in this case is found in Ward v. Rock Against Racism, 419 U.S. 781 (1989). We hold that section 18-9-122(3) is a reasonable time, place, and manner restriction and, hence, does not violate the proscriptions of the First Amendment. See n. 8, supra (recognizing that the First Amendment is applied to the State of Colorado by virtue of the Fourteenth Amendment).

A.

In Schenck, health care providers sought and obtained a preliminary injunction against anti-abortion protestors who engaged in allegedly illegal efforts to prevent individuals from obtaining abortions. See Schenck, 519 U.S. at 362. The Schenck injunction issued by the district court generally restricted the anti-abortion protestors' activities.[10]

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10. The injunction provided:

Defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

1. Enjoined and restrained in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are performed in the Western District of New York;

(b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

(c) physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. In addition, it is further provided that this right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or such reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site;

(d) using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures,

In Schenck, the protestors challenged the injunction claiming that three aspects of the injunction unconstitutionally restricted their First Amendment rights. In particular, the protestors challenged (1) the "floating" fifteen- foot buffer zone around people and vehicles accessing the clinics; (2) the "fixed" fifteen-foot buffer zone around the clinic's doorways, driveways and parking lot entrances; and, (3) the "cease and desist" provision that forced anti-abortion protestors within the buffer zones to retreat fifteen feet from the targeted person. Schenck, 519 U.S. at 371. The Supreme Court held that, while the fixed buffer zone was constitutionally permissible, the floating buffer zone was unconstitutional. See id. at 377, 380. Applying the test it established in Madsen, 512 U.S. at 765, for evaluating content-neutral injunctions that restrict speech, the Court held that the floating buffer zones burdened more speech than was necessary to serve the governmental interests underlying the issuance of the injunction. See Schenck, 519 U.S. at 377-79.

While we recognize certain factual similarities between Schenck and the instant case, that is, they both involve anti-abortion protestors' free speech claims regarding medical facilities which offer abortion counseling and they both create floating buffer zones, upon close examination, we cannot conclude that the test applied in Schenck is the appropriate

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> disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed, nor shall any person make such sounds which interfere with the rights of anyone not in violation of this Order;
>
> (e) attempting, or inducing, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a) through (d) above.

Schenck, 519 U.S. at 366-67.

standard by which to determine whether section 18-9-122(3) meets constitutional scrutiny. Our inability to agree with petitioners' reliance upon Schenck is based on an important distinction readily drawn between the two cases in the nature of the government regulation. Schenck involved a judicially created preliminary injunction drawn solely for the parties before the Court under the circumstances then existing. Here, to the contrary, section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly of the State of Colorado.

As explained by the Supreme Court in Madsen, 512 U.S. at 763, one of the differences between judge-drawn injunctions and statutes crafted in the political process is that, "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances." As such, the General Assembly's enactment of section 18-9-122(3), which is not premised upon an evidentiary record for identifiable parties to litigation, but, instead intended for general application reaching all citizens, is entitled to greater deference than the judge-made injunction in Schenck. See Madsen, 512 U.S. at 763 (applying "a somewhat more stringent application of general First Amendment principles" when determining the constitutionality of an injunction). Thus, we conclude that to apply the appropriate standard for determining the constitutionality of a content-neutral statute, we rely upon Ward and not Schenck.

B.

Petitioners also urge us to rely on the Ninth Circuit's decision in Sabelko v. City of Phoenix, 120 F.3d 161 (9th Cir.1997). We decline to do so. As here, Sabelko was decided pursuant to a Supreme Court remand in light of Schenck. In response to the conduct of anti-abortion protestors outside abortion facilities,

Phoenix had enacted a city ordinance which created an eight-foot floating buffer zone and required counselors to withdraw upon request. See Sabelko, 120 F.3d at 162-63. Using the Ward test, the Ninth Circuit held the ordinance unconstitutional, concluding that it was not narrowly tailored. See Sabelko 120 F.3d at 165.

First, we note that authority from the Ninth Circuit, or any other lower federal court, is not controlling precedent for Colorado courts.

> Although the Supremacy Clause demands that state law yield to federal law, neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a federal court's interpretation other than that of the United States Supreme Court. Thus, we are not bound by . . .decisions of the lower federal courts.

Community Hosp. v. Fail, No. 97SC558, slip op. at 4 (Colo. Nov.30, 1998); see also Lockhart v. Fretwell, 506 U.S. 364, 375, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.").

Second, we conclude that Sabelko is factually distinguishable from the instant case. In Sabelko, anti-abortion protestors were required to withdraw from an approaching person, even if the protestor remained standing still, upon request. See 120 F.3d at 164. In other words, under the Sabelko ordinance, if a protestor stood still and an individual came within eight feet, the protestor would have violated the ordinance. Section 18-9-122(3), in contrast, imposes no such duty upon petitioners because of the "knowingly approaches" requirement, discussed below. Indeed, under our interpretation of its language, and as both parties conceded at oral argument, the statute is not

violated if petitioners stand still while inside the floating buffer zone. Hence, a petitioner who does not act to approach a person going into or coming out of a health care facility does not violate section 18-9-122(3), even if an individual comes within eight feet of him or her, as long as the petitioner does not "approach" the individual. See Part V. D., infra.

C.

While the protections afforded by the First Amendment are broad, they are also not limitless. "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. " Heffron v. ISKCON, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (emphasis added). For example, if restriction of speech is facilitated by a content-neutral statute, "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place and manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); see also 7250 Corp. v. Board of County Comm'rs, 797 P.2d 917, 923-25 (Colo.1990).

Because government cannot favor one idea over another, its regulation of speech must be content-neutral. See Mosley, 408 U.S. at 95. A statute is content-neutral if it is " 'justified without reference to the content of the regulated speech.' " Ward, 491 U.S. at 791 (quoting Community for Creative Non-Violence, 468 U.S. at 295). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791. In other words, a restriction on speech is content-neutral if the government makes no attempt to control the content of the speech protected and regulated thereby. See 7250 Corp., 799 P.2d at 925.

We note that both the trial court and the court of appeals found that section 18-9-122(3) is content-neutral, and that petitioners do not contend otherwise in this appeal. Further, our

review of that section satisfies us that it is, indeed, content-neutral. The restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech. Thus, we conclude that section 18-9- 122(3) is content-neutral, and, therefore, we shall apply the test announced in Ward.

V.

A.

Before applying that standard, however, we first review the Supreme Court's holding in Ward. In Ward, New York City promulgated what it termed "Use Guidelines" (guidelines) in an attempt to regulate the sound amplification systems used by Rock Against Racism (RAR), an organization sponsoring musical concerts to convey a message on New York City property. See Ward, 491 U.S. at 787. RAR in turn filed a successful motion for an injunction against enforcement of particular aspects of the guidelines. See id. at 788. RAR also sought damages and a declaratory judgment striking down the guidelines as facially invalid. See id. The district court, applying the three-part test for determining the constitutionality of time, place or manner restrictions, found the guidelines valid. See id. at 789. On appeal, the Second Circuit Court of Appeals reversed, based on its conclusion that the city could have used less restrictive means of regulating the volume of RAR's concert. See id.

The Supreme Court reversed the federal appellate court and upheld the constitutionality of the city's regulation of speech. In so doing, the Court utilized a two-part test for determining whether the content-neutral guidelines were constitutional. First, the Court inquired into whether the regulation was " 'narrowly tailored to serve a significant governmental interest.' " Id. at 796 (quoting Community for Creative Non-Violence, 468 U.S. at 293). Here, we note that the Court emphasized that the Second Circuit erred in holding that the regulation had to be

"'the least intrusive means' of achieving the desired end." Id. at 797. Rather, the Court explained, "our cases quite clearly hold that restrictions on time, place or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.' " Id. (quoting United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). The Court then clarified,

> [l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.

491 U.S. at 798.

The Court then proceeded to the second, and final, requirement for finding a legislatively imposed restriction on speech constitutional, that the restriction leave ample alternative channels of communication open. See id. at 802. Here the Court explained the precise nature of permissible restriction of speech by stating, "[t]hat the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." Id. Thus, absent a showing that the resultant, permissible means of communicating information are inadequate for petitioners to express themselves, section 18-9-122(3) will be deemed to have left open ample alternatives, and therefore, should be upheld as constitutional.

Applying the standard set forth in Ward here, we hold that section 18-9- 122(3) is a reasonable restriction on the time, place, and manner of petitioners' speech and, therefore, is valid under the First Amendment for the reasons set forth below.

B.

First, section 18-9-122(3) is sufficiently narrowly drawn to further a significant government interest. The statute mandates that an individual can only be convicted of criminal conduct under specified circumstances. Specifically, section 18-9-122(3) prohibits an individual from knowingly approaching another person within eight feet: (1) for the purpose of oral protest, counseling, education, leafletting, or displaying a sign to that person; (2) within 100 feet of a health care facility entrance; (3) without that person's consent.

Petitioners contend that section 18-9-122(3) is not narrow because, although the General Assembly declared its intent to curtail threatening conduct, it only prohibits protected speech. We disagree. The plain language of the statute indicates that it regulates speech and the conduct of "passing a leaflet or handbill," and "displaying a sign." Petitioners also contend that because their speech is directed to everyone, including "innocent" passers-by on the sidewalk who are not entering the health care facility, the statute unduly restricts speech that is intended to be only directed towards passers- by. Again, we disagree.

In rather simple but straight-forward language, the statute prohibits individuals from "knowingly approaching " a person within eight feet without that person's consent. Under section 18-9-122(3), a criminal statute, two requirements must be met to constitute a violation: (1) the mens rea requirement, "knowingly"; and (2) the actus reus requirement, "approaches." If one of the petitioners is standing still within the fixed buffer zone, and an individual walks toward him or her, the petitioner need not change his or her physical positioning to maintain eight feet of distance and thus avoid violating the statute, even if the approaching individual comes within less than eight feet of the petitioner. In other words, so long as the petitioner remains still, he or she cannot commit the actus reus of approaching, even though he or she may well have the requisite mens rea of "knowingly." Thus, in any scenario, petitioners are

free to attempt to speak with whomever they wish and they will not violate the statute, so long as the mens rea and actus reus do not coincide. See Cooper v. People, No. 97SC662, slip op. at 13-14 (Colo. Jan.11, 1999). Therefore, any risk of an inadvertent violation involving an "innocent" passer-by is, at most, de minimus.

Admittedly, under the statute, petitioners may not "knowingly approach" an individual within eight feet unless the petitioner has obtained the individual's consent.[11] What renders this statute less restrictive than both the injunction in Schenck and the ordinance in Sabelko is that under section 18-9-122(3), there is no duty to withdraw placed upon petitioners even within the eight-foot limited floating buffer zone. Thus, an inadvertent violation caused by a third party is not a legitimate threat here, as all parties conceded at oral arguments.

Petitioners also contend that the statute is not narrow enough because it applies to all health care facilities in Colorado. The fact that the statute may apply to persons entering health care facilities beyond those providing abortion counseling does not render the statute overly restrictive of speech. Rather, simply and purposefully, that fact renders the statute comprehensive. Indeed, the applicability of the statute to situations other than anti-abortion protesting is one reason we conclude that the statute is content-neutral. And we decline any invitation on this record to conclude that a facet of a statute that renders it content-neutral necessarily renders it overly broad.

C.

Second, we also hold that the statute furthers a significant

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11. We emphasize here that this floating buffer zone exists only within 100 feet of the entrance and not outside the fixed buffer zone, such as parking lots and sidewalks outside the 100 foot fixed buffer zone.

government interest. After open public hearings that provide support for its public policy action we review today, the General Assembly declared in section 18-9-122(1) that "access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state." Indeed, the statute was enacted, in part, through the General Assembly's police power, and by a General Assembly that was concerned with the safety of individuals seeking wide-ranging health care services, not merely abortion counseling and procedures. See Hearings on H.B. 93-1209 Before the House Judiciary Committee, 59th General Assembly, 1st Reg. Sess. (Audio Tape 93-8, Feb. 12, 1993, at 7:42 a.m.); see also part II. A., supra. Clearly, a fair reading of the legislative record reflects a legislative response to conduct that subjected citizens in Colorado to harassing, confrontational, and violent conduct. See part II. A., supra. We conclude that that this express purpose furthers a significant government interest. See Schenck, 519 U.S. at 374-76 (holding that unimpeded access to clinics is a significant governmental interest); Madsen, 512 U.S. at 767 (holding that the government has a substantial interest "in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy"); Sabelko, 120 F.3d at 164 (same). Moreover, we note that it has long been acknowledged that government "may properly assert important interests in safeguarding health." Roe v. Wade, 410 U.S. at 150; see also Cox v. Louisiana, 379 U.S. 559, 562, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

D.

Finally, turning to the last requirement under Ward, that ample alternative channels of communication be left open, we similarly conclude that section 18-9-122(3) passes muster. Section 18-9-122(3) does not prohibit verbal communication, as petitioners contend. While the authority to regulate in some instances may include the power to deny, here petitioners' argument is not persuasive. Petitioners, indeed, everyone, are

still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion. They just cannot knowingly approach within eight feet of an individual who is within 100 feet of a health care facility entrance without that individual's consent. As articulated so well by the Supreme Court in Ward, "[t]hat [section 18-9-122(3)] may reduce to some degree the potential audience for [petitioners'] speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." Ward, 491 U.S. at 802. In fact, although leafleting is deterred under the statute, petitioners have failed to offer any credible evidence that normal conversation or the communication of their message through demonstrative devices, such as placards and photographs, limits communication of their message. Moreover, because petitioners may knowingly approach up to eight feet of any person, in the parking lot, on the sidewalk, and even at the health care facility door, under the statute at issue here, we fail to see how petitioners' audience is diminished at all. On its face, there is nothing that prohibits protestors from being seen and heard by those accessing health care facilities as well as passers-by.

It is important to emphasize that in Schenck the Supreme Court did not strike down all "floating" buffer zones per se, as the petitioners essentially contend. In striking down the floating buffer zones created by the injunction in Schenck, the Court recognized that "there may well be other ways to both effect ... separation and yet provide certainty (so that speech protected by the injunction's terms is not burdened)...." 519 U.S. at 378-79. In fact, it was the uncertainty of how to comply with the injunction about which the Supreme Court appeared most concerned. The Court stated that because the protestor would have to move with the individual, and because the clinic sidewalks were only seventeen-feet wide, "it would be quite difficult for a protestor who wishes to engage in peaceful expressive activities to know how to remain in compliance with

the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." Id. at 378.

Here, in contrast, the statute is so narrowly drawn that these concerns are alleviated. First, protestors must only maintain a distance of eight feet, not fifteen, which allows for normal conversational tones. Second, where in Schenck a protestor could have easily violated the injunction merely by standing still if, for example, an individual approached a protestor, then that protestor would violate the injunction. Here, in contrast, the mens rea "knowingly" requirement ensures that scenario will not be possible. Even if a protestor is approached by an individual, the protestor will only violate the statute if, along with the several other requirements of the statute, he or she "knowingly approaches" the individual for the purpose of passing a leaflet or engaging in oral protest. The inadvertent violation, or at least the possibility of such a violation, is substantially avoided by the plain terms of the statute. In Schenck, in order to avoid violating the injunction, the protestors were obligated to maintain sufficient separation of fifteen feet at all times. There, the movement of a third party could place the protestors in the position of having violated the injunction. Here, to the contrary, petitioners may actually stand still and though individuals may approach within eight feet of petitioners, the requisite actus reus of "approach[ing]" is not met. Thus, we do not believe that, even under the Schenck test, section 18-9-122(3) burdens more speech than is necessary.

VI.

In sum, we hold that section 18-9-122(3) represents a fair legislative balancing of the "right to protest or counsel against certain medical procedures" while protecting "a person's right to obtain medical counseling and treatment." In addition, we find the General Assembly's statutory response a fair accommodation of two fundamental rights. We also conclude

that "the right to be let alone," Olmstead, 277 U.S. at 478, is consistent with the well-accepted notion that "[t]he First Amendment does not guarantee the right to communicate one's views ... in any manner that may be desired." Heffron, 452 U.S. at 647 (emphasis added).

Thus, we hold that section 18-9-122(3) is a valid time, place and manner restriction, a permissible legislative response designed to assure safety and order for citizens entering and leaving Colorado health care facilities. It is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels of communication. Accordingly, we affirm the judgment of the court of appeals.

[Appendix B]

DISTRICT COURT, COUNTY OF JEFFERSON,
STATE OF COLORADO
CASE NUMBER 93 CV 1984, DIVISION II - GFP

ORDER

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Plaintiffs,

-v-

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado:, THE CITY OF LAKEWOOD, COLORADO; GALE A. NORTON, in her official capacity as Attorney General for the State of Colorado; and STATE OF COLORADO, Roy Romer, Governor,

Defendants.

This matter comes before the Court on the Defendant's Motion for Summary Judgement. The Court finds that it has jurisdiction over the parties and subject matter of this action, and being fully advised in the premises has dispensed with a hearing on the motion pursuant to C.R.C.P. Rule 121, Section 1-15.

After reviewing the record, the Defendant's Motion, the Plaintiff's Response and the briefs submitted by the parties, the Court finds Pursuant to Rule 56 C.R.C.P., there are no genuine issues of material fact in dispute and that the issues presented are issues of law.

The Plaintiff's challenge C.R.S. Section 18-9-122 as (1) a violation of freedom of speech under the United States Constitution; (2) a violation of the freedom of press under the

United States Constitution; (3) a violation of right of peaceable assembly under the United States Constitution; (4) a violation of the due process clause of the United States Constitution; (5) a violation of the equal protection clause of the United States Constitution; and violative of applicable provisions of the Colorado State Constitution.

"[al statute is presumed constitutional... and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" Heller v. Doe, 113 S.Ct 2637, 2643 (1993), See also Parrish v. Lamm, 758 P.2d 1356, 1364 (Colo. 1988).

The Court finds that C.R.S. Section 18-9-122 has not been applied to the Plaintiffs. There is no showing by the Plaintiffs that any of them have been arrested, charged, cited. detained or referred for prosecution for violating any part of C.R.S. Section 18-9-122. See admissions of all Plaintiffs.

Therefore the Plaintiffs have only presented a facial challenge to the statute. Where a statute has not been enforced, the challenge is identified as facial. See High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984). Therefore, the Court must examine on its face to determine whether C.R.S. Section 18-9-122 can be possibility construed as constitutional and avoid strained interpretations. People v. Smith, 862 P.2d 939 (Colo. 1993).

It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment. The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed by the Constitution.

FREEDOM OF SPEECH

The Plaintiffs engage in "sidewalk counseling." This activity consists of efforts to educate counsel, persuade or inform persons about abortion and alternatives to abortion. This is accomplished through oral expression, protest, displays, signs and leafletting. See affidavits of all Plaintiffs. There is no

question that the Plaintiffs conduct implicates First Amendment rights.

However, the First Amendment does not guarantee the right to communicate one's view's at all times and places or in any manner that may be desired." Heffron v. ISKCON, 452 U.S. 640 (1981).

The Plaintiffs engage in these activities on the public streets and public sidewalks. Many times these are located within 100 feet of the entrances to medical facilities. The statute clearly applies to these locations.

The public sidewalks and streets, including the ones that the statute would apply, constitute "quintessential" public forum for First Amendment purposes. See Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

However, the state may subject such expression whether oral or written or symbolized, by conduct to reasonable time, place, and manner restrictions. These regulations will be found reasonable where they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications." Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

A. CONTENT NEUTRAL

The Supreme Court states that "the principal inquiry in determining content neutrality... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.5. 781, 785 (1989).

The Plaintiffs argue that one may be prosecuted under the statute if negative statements are said to people in the vicinity because the statute uses the word "protest." They argue that the statute would not apply to positive statements and therefore positive statements would be permissible. However, the statute applies not only to oral protest but to "education" and

"counseling." It appears clear that the statute applies to all viewpoints, rather then only certain viewpoints.

Furthermore, evidence provided by the Defendant's show that the legislative history of the statute makes it clear that the statute applies to all viewpoints rather then certain viewpoints. The state has not favored one view point over another as the Plaintiffs contend.

The Court finds the statute in question applies even-handedly to all speakers and the content of their speech. All persons demonstrating are to comply with the statute. The statute does not govern the subject matter of the message.

B. THE REGULATION MUST BE NARROWLY TAILORED, TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

The statute is designed to protect access to health care facilities. It protects the persons using a health care facility to do so without being threatened, harassed or assaulted by forced confrontations with demonstrators.

The regulation is unrelated to the content of the message. It is related to safeguarding access to health care facilities. This regulation applies equally, not only to pro life or pro choice protestors, but any others engaged in the activities that the statute addresses. Furthermore, even if the regulation has some incidental effect on some speakers and not others the regulation will be deemed neutral. See Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Plaintiffs argue there are other statutes designed to deal with this problem such as assault, trespass, harassment. However, C.R.S. Section 18-9-122 targets the offensive and disturbing conduct taking place outside health care facilities. It address [sic] the exact source of evil it seeks to remedy.

The Court finds that the "free zone" is narrowly tailored to address these abuses that impede ingress and egress to medical facilities and the regulation promotes a significant

governmental interest that is unrelated to the content of the message.

C. AMPLE ALTERNATIVE MEANS OF COMMUNICATION;

The statutory scheme leaves open ample alternative means of communication. The Plaintiff's message can still reach its intended audience.

The statute only restricts the demonstrators from engaging in their activities within the "free zone " This area constitutes 100 feet of the entrance of a medical facility and within 8 feet of the listener unless the listener consents. The plaintiffs signs and leaflets may be seen at this distance. Speech may also be heard at this distance.

Although, it may be more difficult for the Plaintiffs to force leaflets in the hands of unwilling recipients and their messages upon audiences unable to escape, the Plaintiff's are able to carry on their activities provided they do so outside the "free zone."

OVERBREADTH CHALLENGE

In order for the Court to invalidate the statute there must be a substantial overreach of the statute. "[P]articularly where conduct and or merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

The statute must be so sweeping in its scope as to deter both protected and unprotected speech. The overbreadth doctrine has been applied to certain statute that prohibit certain types of unprotected speech, but may also apply to protected speech. This is applied to ensure that the statute does not censure protected speech. Hoffman Estates, 455 U.S. at 594. It is not for the Court to determine how creative the challenging party must be in conceiving situations where the language of the statute might be applied to protected speech.

In this case the statute does not prohibit speech. The statute only imposes reasonable time, place and manner restraints on the First Amendment activity. The statute does provide objective standards and guidelines for permitting or denying the display of signs, the distribution of literature and/or speaking. All these activities may be engaged in as long as the speakers remain outside the "free zone."

The Court believes the statute will do little to deter protected speech. The Plaintiffs state in their affidavits that they will continue with their protected First Amendment activities. See Affidavits of Plaintiffs.

VAGUENESS CHALLENGE

The law must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104 (1972). In addition the law must provide standards for applying the law. Id. at 109.

The words of the statute are given their commonly accepted and understood meaning. East Lakewood San. Dist. v. District Court, 842 P.2d 233, 235 (Colo. 1992).

The statue uses common ordinary terms. The statute speaks in terms of "oral protest," "counseling," and "education." These are everyday terms in which people of ordinary intelligence would be familiar. The statute also provides exact measurements in which these activities may not take place. This area is known as the "free zone." This zone constitutes the area within 8 feet of a person and the area within 100 feet of a medical care facility.

The Court finds that the statute uses terms that fairly and accurately describe conduct forbidden within the "free zone."

The Court finds the statute gives warning of the prohibited conduct. That the Plaintiffs know how to carry out their activities within the proscribed limits of the statute and know what is expected of them when they are "sidewalk counseling."

PRIOR RESTRAINTS

The Plaintiffs argue that C.R.S. Section 18-9-122(3), imposes a requirement of prior permission before speaking. They claim that under this regulation the private citizens of the state or at least all private citizens in the vicinity of a health care facility are somehow deputized and transformed into agents of the State. And therefore, these private citizens have the power to prohibit the Plaintiffs from engaging in their activities if these citizens do not consent. The Court finds the Plaintiffs argument unpersuasive.

Prior restraints deal with situations where the legislature or other government entities attempt to restrain or forbid certain communications in advance of the time in which they are to occur. This is usually accomplished through licensing or permit schemes.

All prior restraints have one thing in common; they give "public officials the power to deny use of a forum in advance of actual expression." Southeast Promotions v. Conrad, 420 U.S. 546 (1975).

This statute requires no license or permit scheme prior to speaking. It does not forbid the Plaintiffs activities. Therefore, the prior restraint doctrine has no applicability to this statute.

CONCLUSION

The Court addressed all issues set forth in the motions for Summary Judgment and therefore by direct reference or comments made herein disposes of all issues raised in the complaint.

It is therefore ordered that the motion for Summary Judgment of the Defendant's be granted, that C.R.S. Section 18-9-122 as amended is facially constitutional, and that the complaint be, and the same is hereby dismissed.

DONE AND SIGNED IN OPEN COURT this 22nd day of April, 1994.

BY THE COURT:

/s/
Gaspar F. Perricone
District Judge

[certificate of mailing omitted]

[Appendix C]

Colorado Court of Appeals July 13, 1995
No. 94CA0856

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr.,

Plaintiffs-Appellants,

v.

City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General of the State of Colorado; and the State of Colorado, Roy Romer, Governor,

Defendants-Appellees.

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge.
No. 93CV1984.

Division V JUDGMENT AFFIRMED
Opinion by JUDGE RULAND
Sternberg, C.J., and Rothenberg, J., concur

The American Center for Law & Justice, Jay Alan Sekulow, James Matthew Henderson, Sr., Washington, DC; Roger W. Westlund, Thornton, for plaintiffs- appellants.

Gorsuch Kirgis L.L.C., Roger W. Noonan, Maureen Herr Juran, Denver, for defendant-appellee City of Lakewood, Colorado.

Gale A. Norton, Atty. Gen., Stephen K. ErkenBrack, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Carol D. Angel, Sr. Asst. Atty. Gen., Kathie A. Greenwalt Troudt, Asst. Atty. Gen., Denver, for defendants-appellees Gale A. Norton and State of Colo., Roy Romer, Governor.

Fairfield and Woods, P.C., Howard Holme, Denver; Legal Action for Reproductive Action, Celeste Lacy Davis, Roger K. Evans, New York City, for amicus curiae Planned Parenthood of the Rocky Mountains.

Joseph N. de Raismes, III, City Atty., Boulder, for amicus curiae City of Boulder.

The principal issue in this appeal is whether § 18-9-122(3), C.R.S. (1994 Cum.Supp.) violates the right of free speech contained in the First Amendment to the United States Constitution. Plaintiffs, Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., appeal from a summary judgment determining that the statute does not violate the First Amendment. We affirm.

Section 18-9-122, C.R.S. (1994 Cum.Supp.), enacted in 1993, provides:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.
>
> . . . .
>
> (3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any

entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

Prior to this statute's adoption, hearings were conducted before the House and Senate Judiciary Committees of the General Assembly. In one of the hearings before the House Committee, testimony was presented concerning the conduct of some antiabortion protesters at various medical clinics directed both at patients and staff. See Tape Recording of Testimony before House Judiciary Committee concerning H.B. 1209 (February 12 & 16, 1993, 59th General Assembly). This conduct included efforts to block access to the clinics and to intimidate and harass patients and staff in various ways. The committees were also informed, however, that out of 60,000 patients who obtained services at one of the clinics, only seven percent were there to consider abortions. Nevertheless, all patients were subjected to the same treatment by the protesters. See Tape Recording of Testimony before Senate Judiciary Committee concerning H.B. 1209 (March 3, 1993, 59th General Assembly).

The committees also heard testimony that other types of protests such as those made by animal rights activists occur at medical clinics in the United States where the transplant of animal organs is performed or assessed. The witness also indicated that protesters create a particularly difficult situation for persons with physical disabilities who lack the physical capability to move through crowds. See Tape Recording of Testimony before House Judiciary Committee concerning H.B. 1209 (February 12 & 16, 1993, 59th General Assembly).

Following passage of the statute, plaintiffs filed this action seeking a declaratory judgment that s 18-9-122(3), C.R.S. (1994 Cum.Supp.) violates the First Amendment on its face and that a permanent injunction should enter against enforcement of the statute by defendants, David J. Thomas (as District Attorney), the City of Lakewood, Gale A. Norton (as Attorney General), and the State of Colorado.

In their complaint and affidavits filed relative to the summary judgment, plaintiffs state that they are "sidewalk counselors" who offer abortion-bound women alternatives to that medical procedure. Plaintiffs state that they educate, counsel, persuade, or inform pedestrians and occupants of motor vehicles in areas adjacent to medical clinics about abortion and abortion alternatives.

To assist in this effort, plaintiffs prepare and distribute written material including cards, leaflets, and pamphlets. Plaintiff Hill uses a fetal model in her counseling and displays it to the public. Posters are also used. Plaintiffs claim that it is impossible at times both to remain on the sidewalk and stay at least eight feet away from others in order to continue speaking, displaying signs, or otherwise protesting or counseling.

I

Section 18-9-122(3) incorporates the so-called "bubble" concept designed to allow communication between protesters and others but to separate the protesters by an eight-foot distance. The statute applies to public sidewalks and streets which are areas protected by the First Amendment. See Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L.Ed.2d 420 (1988); Denver Publishing Co. v. City of Aurora, 896 P.2d 306 (Colo.1995).

Plaintiffs contend that the statute is unconstitutional for a number of reasons. First, they argue that the statute is an improper "content based" regulation which is directed only at them and applies to all forms of written and oral communication. Second, they assert that the statute is overbroad because it infringes upon their right of free speech more than necessary to accomplish the goal of providing access to health care facilities. We are not persuaded by either argument.

Initially, we address whether a presumption of constitutionality applies to s 18-9-122(3). As our supreme court held in Denver Publishing Co. v. City of Aurora, supra, if the

statute is deemed to be a "content-neutral" statute, plaintiffs must introduce competent evidence that the regulation in fact burdens the exercise of free speech. The burden then shifts to defendants to demonstrate that the statute withstands application of the appropriate constitutional standard of review.

If, on the other hand, the statute is intended to apply only to plaintiffs because of their beliefs and viewpoint regarding abortion, then Denver Publishing Co. v. Aurora, supra, suggests that there may be a presumption against its constitutionality. Cf. People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo.1985).

The next issue then is whether the statute is content-neutral, that is, whether the statute is directed only to anti-abortion protesters and their viewpoint.

In Madsen v. Women's Health Center, Inc., 512 U.S. ----, 114 S. Ct. 2516, 129 L.Ed.2d 593 (1994), the United States Supreme Court addressed the provisions of a mandatory injunction issued by a Florida state court against protesters at medical clinics in this context. We view the analysis of the Court as instructive here.

Like the injunction entered in Madsen, ε 18-9-122(3) does not address only the speech of anti-abortion protesters. The statute would impose the same restrictions upon protesters demonstrating in favor of abortion. The law would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant. Accordingly, applying the analysis of Madsen, we conclude that § 18-9-122(3) is content-neutral because the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred. See American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.1995) (upholding constitutionality of the Federal Freedom of Access to Clinics Entrances Act).

Given our determination that the statute is content-neutral,

Madsen indicates that the constitutionality of § 18-9-122(3) must be analyzed under the criteria stated in Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989); see also Denver Publishing Co. v. City of Aurora, supra. The Court in Ward confirmed its holding in prior cases that, even on public streets and sidewalks, the government may impose reasonable restrictions on the time, place, or manner of speech. However, those restrictions must be "narrowly tailored," that is, the restrictions must limit free speech only to the extent reasonably necessary to serve a significant governmental interest. Otherwise, the statute is deemed "overbroad." Finally, it must appear that there are "ample alternative channels" for communication of the information.

We hold that § 18-9-122(3) meets the enumerated constitutional requirements.

First, the statute advances a significant governmental interest, namely, to ensure the safety and unobstructed access for patients and staff entering and departing from health care facilities.

Second, the statute does not burden speech more than is reasonably necessary because plaintiffs may continue to communicate with the patients and staff at a distance of eight feet or more. Indeed, the restriction merely is directed at depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff.

Finally, in addition to oral communication, posters and signs may be made visible at eight feet with the result that reasonable alternatives to face-to- face communication and direct pamphlet handouts are available. Accordingly, we conclude that the trial court did not err in concluding that defendants satisfied their burden to demonstrate that the statute satisfied the applicable constitutional requirements. Further, to the extent that Edwards v. City of Santa Barbara, 883 F.Supp. 1379 (S.D.Cal. No. 94-2243 RG (JRX), March 14, 1995) is inconsistent with the result we reach here, we decline to follow that case.

II

Plaintiffs next contend that § 18-9-122(3) is unconstitutionally vague. Specifically, they argue that a person of common intelligence will not be able to understand what conduct is prohibited in the context of "knowingly approach." They further contend that the terms "consent," "protest," and "counseling and education" fail to meet constitutional requirements for definiteness. We disagree with all of these contentions.

The term "knowingly" is defined in s 18-1-501(6), C.R.S. (1986 Repl.Vol. 8B) of the Criminal Code. A protester acts knowingly if the protester is aware that his or her conduct will cause the protester to be less than eight feet from someone entering or leaving the health care facility without consent. See People v. Krovarz, 697 P.2d 378 (Colo.1985).

Because the remaining terms are not technical in nature, we must apply the common usage of those words. Section 2-4-101, C.R.S. (1980 Repl.Vol. 1B). To the extent that plaintiffs seek to contrast alternative definitions of the words used, we must apply a common definition that is not vague. See Frisby v. Schultz, supra; City of Englewood v. Hammes, 671 P.2d 947 (Colo.1983).

Thus, as pertinent here, "protest" refers to written or oral communication advocating a viewpoint on medical treatment and procedures. See Webster's Third New International Dictionary 1823. "Consent" refers to oral communication or unmistakable physical conduct manifesting agreement. See Webster's Third New International Dictionary 482. "Counseling and education" refers to efforts to present information or guidance to persons entering or leaving a health care facility.

III

Plaintiffs also contend that s 18-9-122(3) constitutes an unconstitutional prior restraint on speech because the consent of a patient is required before a protester may approach within less than eight feet but no time deadline for the patient's consent

is provided. Further, they argue that private citizens have unlimited discretion to determine whether consent will or will not be given without having to apply reasonable guidelines. Finally, they complain that there is no judicial review provided in the statute to determine whether the private citizen's discretion has been exercised in a reasonable fashion. There is no merit in these contentions.

Statutes which have been held unconstitutional as a prior restraint on free speech ordinarily involve a governmental or other entity that has authority to permit or not to permit certain activities in a public forum. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975). We are not aware of any authority that would extend this doctrine to impose limitations upon the right of a private citizen to determine whether to permit others to confront that individual concerning medical care or treatment.

The judgment is affirmed.

CHIEF JUDGE STERNBERG and JUDGE ROTHENBERG, concur.

[Appendix D]

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC593
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0856
DISTRICT COURT, JEFFERSON COUNTY, 93CV1984

ORDER OF COURT

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; GALE NORTON, in her official capacity as Attorney General of the State of Colorado ; and THE STATE OF COLORADO, ROY ROMER, Governor,

Respondents

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 26, 1996.

[service list omitted] [seal omitted]

[Appendix E]

Supreme Court of the United States

No. **95-1905**

LEILA JEANNE HILL, AUDREY HIMMELMANN, and EVERITT W. SIMPSON, JR.,

Petitioners

v.

COLORADO, ET AL.

ORDER ALLOWING CERTIORARI.
Filed February 24, 1997.

The petition herein for writ of certiorari to the Court of Appeals of Colorado is granted.

[Appendix F]

Supreme Court of the United States

No. **95-1905**

LEILA JEANNE HILL, AUDREY HIMMELMANN, and EVERITT W. SIMPSON, JR.,

Petitioners

v.

COLORADO, ET AL.

ON WRIT OF CERTIORARI to the Court of Appeals of Colorado.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and the case is remanded to the Court of Appeals of Colorado for further consideration in light of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. ___ (1997).

IT IS FURTHER ORDERED that the petitioners Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., recover from Colorado, et al., Three Hundred Dollars ($300.00) for their costs herein expended.

February 24, 1997

Clerk's costs: $300.00

[Appendix G]

COLORADO COURT OF APPEALS ORDER
No. 94CA0856

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr.,

Plaintiffs-Appellants,

v.

City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General of the State of Colorado; and the State of Colorado, Roy Romer, Governor,

Defendants-Appellees.

This case was remanded to the Colorado Court of Appeals by the United States Supreme Court for reconsideration in light of the Supreme Court's opinion in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. ___, ___ L.Ed.2d ___, 117 S. Ct. 588 (1997).

Having review the opinion in *Schenck*, the Court now ORDERS that the parties file simultaneous briefs, not exceeding ten pages in length, addressing the following issue:

Is the eight-foot floating bubble contained in § 18-9-122, C.R.S. (1996 Cum. Supp.) constitutionally permissible?

The briefs of the parties shall be filed no later than Wednesday, May 14, 1997.

Division V:

Sternberg, C.J.

Ruland, J.

Rothenberg, J.

This Order is issued this 24th day of April, 1997.

[service stamp omitted]

[Appendix H]

COLORADO COURT OF APPEALS June 26, 1997
No. 94CA0856

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr.,

Plaintiffs-Appellants,

v.

City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General of the State of Colorado; and the State of Colorado, Roy Romer, Governor,

Defendants-Appellees.

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge
No. No. 93CV1984

Division V JUDGMENT AFFIRMED
Opinion by JUDGE RULAND
Sternberg, C.J., and Rothenberg, J., concur

The American Center for Law & Justice, Jay Alan Sekulow, James Matthew Henderson, Sr., Washington, D.C.; Roger W. Westlund, Thornton, for Plaintiffs- Appellants.

Gorsuch Kirgis L.L.C., Roger W. Noonan, Maureen Herr Juran, Denver, for Defendant-Appellee City of Lakewood, Colorado.

Gale A. Norton, Attorney General, Martha Phillips Allbright, Chief Deputy Attorney General, Richard A. Westfall, Solicitor General, Carol D. Angel, Assistant Attorney General, Denver, for Defendants-Appellees Gale A. Norton and State of Colorado, Roy Romer, Governor.

Fairfield and Woods, P.C., Howard Holme, Denver; Legal Action for Reproductive Action, Celeste Lacy Davis, Roger K. Evans, New York City; Kevin C. Paul, Denver, for Amicus Curiae Planned Parenthood of the Rocky Mountains and The Center for Reproductive Law & Policy, Inc.

Joseph N. de Raismes, III, City Attorney, Boulder, for Amicus Curiae City of Boulder.

In Hill v. City of Lakewood, 911 P.2d 670 (Colo.App.1995) (Hill I), we affirmed the judgment of the district court determining that § 18-9- 122, C.R.S. (1996 Cum.Supp.) did not violate the First Amendment. Thereafter, the United States Supreme Court announced Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

The Supreme Court then granted a petition for certiorari to review Hill I. Hill v. Colorado, --- U.S. ----, 117 S.Ct. 1077, 137 L.Ed.2d 213 (1997). In disposition of that certiorari petition, the court has remanded the case to us for reconsideration in light of Schenck.

We requested supplemental briefs from the parties relative to the impact of Schenck on § 18-9-122. Having reviewed and considered those submissions, we again affirm the district court's judgment.

Section 18-9-122 provides:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.
>
> . . . .
>
> (3) No person shall *knowingly* approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(emphasis supplied)

As noted in Hill I, the statute was adopted by the General Assembly out of concern for public safety issues presented by the conduct of some protestors at various medical clinics that is directed both at patients and staff. These concerns include access for persons with various disabilities who lack the physical capability to move through crowds of protestors.

In Schenck, the Supreme Court addressed a First Amendment challenge to an injunction issued by the United States District Court in response to the conduct of protestors at abortion clinics in the Western District of New York. As pertinent here, the injunction banned "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances" to a clinic. This part of the injunction is referred to as the "fixed buffer zone."

In addition, the injunction banned demonstrations "within fifteen feet of any person or vehicle seeking access to or leaving" a clinic--the "floating buffer zone."

The court upheld the fixed buffer zones around the doorways, driveways, and driveway entrances. The court stated:

> These buffer zones are necessary to ensure that people in vehicles trying to enter or exit the clinic property or clinic parking lots can do so.... [T]he record shows that protestors purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots.

Schenck v. Pro-Choice Network, supra, 519 U.S. at ----, 117 S.Ct. at 868, 137 L.Ed.2d at 22-23.

With reference to the floating buffer zone, the court stated:

> We strike down the floating buffer zones around people entering and leaving the clinics because they burden more speech than is necessary to serve the relevant governmental interests. The floating buffer zones prevent defendants [the protestors] . . . from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. . . . Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment and speech in public areas is at its most protected on public sidewalks. . . .

Schenck v. Pro-Choice Network of Western New York, supra, 519 U.S. at ----, 117 S.Ct. at 868, 137 L.Ed.2d at 22-23.

The court also overturned the floating buffer zones around vehicles. The court held that a more limited injunction that keeps protestors away from driveways and parking lot entrances is sufficient to ensure that drivers are not confused about how to enter the clinic and are able to gain access to its driveways and the parking lots safely and easily.

Plaintiffs now contend that, to the extent the statute creates a floating buffer zone of eight feet, Schenck mandates that we declare the statute unconstitutional. They rely upon language in Schenck to the effect that there is no right to be left alone on a public sidewalk for the purposes of leafletting and that persons using the sidewalk must tolerate insulting and even outrageous speech. They further rely upon the determination in Schenck that 15 feet is to great a distance for normal conversation. Plaintiffs finally rely upon the observation in Schenck that it is difficult to determine when one is less than a specified distance from a patient or staff member, thus making compliance with the statute difficult. We are not persuaded by these arguments.

The court in Schenck expressly declined to hold that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises and protesters. Further, in Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), the court held that the applicable analysis to assess the statute before us is that adopted in Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Specifically, the Madsen court stated:

> If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in Ward v. Rock Against Racism, supra, 491 U.S., at 791, 109 S.Ct., at 2753-2754 and similar cases. Given that the forum around the clinic is a traditional public forum . . . we would determine whether the time, place, and manner regulations were 'narrowly tailored to serve a significant governmental interest.'

Madsen v. Women's Health Center, Inc., supra at 764, 114 S.Ct. at 2524.

As noted in Hill I, and confirmed by the analysis in Schenck, § 18-9- 122 is a content-neutral, generally applicable statute supported by a valid governmental interest. The issue then becomes whether the restrictions in the form of an eight-foot floating buffer zone are narrowly tailored to serve that governmental interest. In this context, it must appear under Ward that ample alternative methods are available for communication of the protesters' information. Applying the Ward rationale here, we conclude that the statute meets constitutional muster.

Initially, we reject plaintiffs' claim that the statute is unconstitutional because of the determination in Schenck that a 15-foot floating buffer precluded protesters from expressing their views from a normal conversational distance. In our view, a lesser distance of eight feet is sufficient to protect that type of speech on a public sidewalk--even for the insulting and outrageous language protected by the First Amendment. Further, under the statute a protester is permitted to approach to a distance of less than eight feet with consent of the patient or staff member.

Finally, with reference to the fact that leafletting may not take place within 100 feet of the entrance to the medical clinic unless consent is given, we view the significant governmental interest here as sufficient to warrant the requirements of the statute. Specifically, as noted in Hill I, a committee of the General Assembly considered the fact that out of 60,000 patients who obtained services at one of the clinics, only 7 percent were there to consider abortions. Nevertheless, all patients were subjected to the same treatment by the protesters.

The committee also heard testimony that the efforts of protesters create a particularly difficult task for persons with disabilities who lack the physical ability to move through crowds.

As a result, in our view the governmental interest of ensuring

easy access to those with physical disabilities by creating an eight-foot buffer zone within a 100-foot area is amply sufficient to justify the statute. Stated otherwise, it seems to us that it is not unreasonable to require protesters to give way to a distance of eight feet so that one with physical disabilities has unimpeded access to a medical clinic especially when the protester can still vocally express his or her views on the issue at hand in a normal conversational voice.

Finally, ample alternate channels for communication other than leafletting are available within 100 feet of the entrance to the health care facility in the form of speech for those without hearing disabilities, placards for those with hearing deficiencies, and other visual items for the sighted patients and staff.

With reference to plaintiffs' complaint that it is difficult to ascertain and maintain an eight-foot distance from each non-consenting patient and staff member, we note that the statute precludes only improper contact made "knowingly." Hence, a successful prosecution could not be based upon an inadvertent violation.

Accordingly, we conclude that Schenck does not compel the conclusion that § 18-22-109 violates the First Amendment.

The judgment is affirmed.

CHIEF JUDGE STERNBERG and JUDGE ROTHENBERG, concur.

[Appendix I]
SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC630
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0856
DISTRICT COURT, JEFFERSON COUNTY, 93CV1984

ORDER OF COURT

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; GALE NORTON, in her official capacity as Attorney General of the State of Colorado; and THE STATE OF COLORADO, ROY ROMER, Governor.

Respondents.

Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, GRANTED as to the issue set forth below, and the briefs shall be filed as follows:

(a) Petitioners' Opening Brief shall be filed within forty days from this date;

(b) Respondents' Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioners' Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

Pursuant to C.A.R. 54(a), the record on file will be treated as though sent up in response to a formal writ.

The issue as announced by the Court this day is as follows:

Whether the court of appeals erred in holding that § 18-9-122, 6 C.R. S. (1997), was constitutional upon the United States Supreme Court's remand to the court of appeals to reconsider the statue under Schenck v. Pro-Choice Network, 117 S. Ct. 855 (1997).

DENIED AS TO ALL OTHER ISSUES.

BY THE COURT, EN BANC, JANUARY 12, 1998.

[service list omitted] [seal of court omitted]

[Appendix J]
THE COURT OF APPEALS OF
THE STATE OF COLORADO

Case Number 94CA0856

ORDER

LEILA J. HILL ET AL V DAVID J. THOMAS ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant herein the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including September 18th 1995, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain if effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Ruland, J.
Sternberg, C.J.
Rothenberg, J.

DATED: August 17, 1995

[service stamp omitted] [seal omitted]

[Appendix K]
THE COURT OF APPEALS
OF THE STATE OF COLORADO

Case Number 94CA0856

ORDER

LEILA J. HILL ET AL V CITY OF LAKEWOOD ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including August 25, 1997, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Ruland, J.

Sternberg, C.J.

Rothenberg, J.

DATED: July 24, 1997

[service stamp omitted] [seal omitted]

[Appendix L]
SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC630
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0856
DISTRICT COURT, JEFFERSON COUNTY, 93CV1984

MANDATE

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; GALE NORTON, in her official capacity as Attorney General of the State of Colorado; and THE STATE OF COLORADO, ROY ROMER, Governor,

Respondents.

This cause having been brought to this court on a writ of certiorari to the Colorado Court of Appeals to review the judgment of said court, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS ORDERED and adjudged that the judgment of the court of appeals is AFFIRMED.

NOW THEREFORE, jurisdiction of this cause is returned to the court of appeals.

WITNESS, the HONORABLE MARY J. MULLARKEY, Chief Justice of our Supreme Court and the Seal thereof,

affixed at my office in the City and County of Denver, this 10th day of March 1999.

MAC V. DANFORD
Clerk of the Supreme COURT

/s/
Deputy Cle

[service list omitted] [seal of court omitted]

[Appendix M]

[The First Amendment states:]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[The Fourteenth Amendment, in pertinent part, states:]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1

[Colorado Revised Statute section 18-9-122 provides:]

Preventing passage to and from a health care facility--engaging in prohibited activities near facility

(1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide

concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

Supreme Court, U.S.
FILED
JUN 17 1999
CLERK

NO. 98-1856

IN THE SUPREME COURT OF THE UNITED STATES
October 1998 Term

LEILA JEANNE HILL *et al.*,

Petitioners,

vs.

THE STATE OF COLORADO *et al.*,

Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEN SALAZAR
Attorney General
MICHAEL E. McLACHLAN
Solicitor General
FELICITY HANNAY
Deputy Attorney General
CAROL D. ANGEL*
Senior Assistant Attorney General
Natural Resources and Environment Section
Attorneys for Ken Salazar and State of Colorado
1525 Sherman Street, 5th Fl.
Denver, Colorado 80203
Telephone: (303) 866-5016
FAX: (303) 866-3558
Counsel of Record

ROGER W. NOONAN
MAUREEN HERR JURAN
GORSUCH KIRGIS LLP
1515 Arapahoe Street
Suite 1000
Denver, Colorado 80202
Telephone: (303) 376-5000
Attorneys for City of Lakewood

36pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

Was the Colorado Supreme Court correct in holding that Colo. Rev. Stat. § 18-9-122(3) (1998), which restricts aggressive, threateningly close approaches by demonstrators within 100 feet of the entrance of health care facilities, is constitutional as a reasonable, content-neutral time, place or manner statutory regulation of speech?

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Colo. Rev. Stat. § 18-9-122(3) (1998) ..... i, 2

STATEMENT OF THE CASE

Respondents perceive a number of misstatements or omissions in Petitioners' Statement of the Case. As the Colorado courts recognized, this statute was enacted by the Colorado General Assembly for the express purpose of safeguarding access to health care clinics, following a history of obstructive demonstrations outside such clinics.[1] *See* Colo. Rev. Stat. § 18-9-122(1) (1998); R.[2] 620, 631-33, 653-55, 665-67, 673-74, 676, 768-69; *see also* Pet. App. at 7a-10a, 40a, 53a[3]. In addition to direct physical blockades, protesters constructively blockaded clinics by surrounding, crowding, yelling at, grabbing, pushing, shoving, hitting, and spitting on those seeking access, triggering dangerous physiological responses in medical patients. R. 191-97, 224-33, 627, 659-60, 715-20. The Colorado General Assembly acted not out of hostility towards any particular viewpoint, but out of concern about the harmful effects of the aggressive and intimidating physical tactics of some demonstrators. R. 620, 623, 629-30, 673, 696-97, 755-56. Most people perceive the overly-close approaches restricted by the statute as threats or intimidation. R. 195-96, 229-30, 461-65.

The Colorado General Assembly addressed this problem by prohibiting both physically obstructing access and interfering with access through approaching unwilling targets at extremely close quarters in order to force leaflets, signs or speech on them. Petitioners persist in misstating

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[1] Several legislators had personal experience or had observed televised reports of such obstructive demonstrations. R. 640, 696-97, 762.

[2] References herein are made to the record before the Colorado Supreme Court, indicated as "R. ____."

[3] References to the decisions of the Colorado courts are made to the Petitioners' Appendix, for the Court's convenience.

the operation of the challenged provision, Colo. Rev. Stat. § 18-9-122(3) (hereinafter "the statute"). *See* Pet. at i, 2, 3, 13, 17, 24, 25. It does not ban expressive activity within eight feet of "passersby," as Petitioners assert. Pet. at i. Rather, within 100 feet of the entrance to a health care facility, it prohibits only: (1) "knowingly approaching" another person more closely than eight feet; (2) without the consent of that other person; (3) for the purpose of oral protest, counseling or education, leafleting, or displaying a sign **to that other person**. *See* Pet. App. at 24a.

In evaluating Petitioners' facial challenge[4] to the statute, the Jefferson County District Court and the Colorado Court of Appeals found that the statute was constitutional, applying what this Court has described as "our standard time, place, and manner analysis" for statutes regulating expressive activities. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 369 (1997). The trial court specifically found that under this test the statute was narrowly tailored to address "abuses that impede ingress and egress to medical facilities." Pet. App. at 33a. The Colorado Court of Appeals also specifically found that the statute satisfied the standard test, ensuring "safety and unobstructed access" to health care facilities while "depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff." Pet. App. at 43a.

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4 The Petitioners have all demonstrated outside health care facilities for a number of years, yet none of them have ever been cited, detained, arrested or referred for prosecution under either the statute or the very similar Denver or Boulder ordinances in effect for over a decade. R. 235-36, 244-45, 253-54. Petitioners Hill and Himmelmann admitted that since passage of the statute, they have continued picketing and oral protest, education and counseling within 100 feet of health care facilities, albeit "with great caution and circumspection." *Id.*

This Court vacated the Colorado Court of Appeals' decision and remanded for reconsideration in light of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which upheld certain provisions of an injunction with similarities to Colorado's statute, and struck down other provisions. On remand, both the Colorado Court of Appeals and the Colorado Supreme Court carefully considered the factors which had rendered part of the *Schenck* injunction invalid, and determined that they were not shared by Colorado's statute.[5] The Colorado Supreme Court accordingly held that the statute was sufficiently narrowly tailored to withstand constitutional scrutiny, as "a valid time, place and manner restriction, a permissible legislative response designed to assure safety and order for citizens entering and leaving Colorado health care facilities." Pet. App. at 29a. Petitioners now seek a second round of review from this court, arguing that *Schenck* requires automatic invalidation of Colorado's statute.

Several of Petitioners' arguments do not appear to have been preserved for review by this Court. The Colorado Supreme Court specifically found that Petitioners had conceded that the reasonable time, place or manner test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), was appropriate for the statute at issue here. Pet. App. at 11a. Further, the Court noted that all the Colorado courts had determined that the statute was content-neutral,

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5 Petitioners did not report all of the reasoning of the Colorado Court of Appeals after remand. Although the Court of Appeals based its decision in part upon the less stringent standard to be applied to statutes, in contrast to the strict standard for injunctions applied in *Schenck*, *see* Pet. at 7, the court also relied on specific differences in this statute's operation that made it more narrowly tailored than the *Schenck* injunction. Pet. App. at 56a.

and that "petitioners do not contend otherwise in this appeal." Pet. App. at 21a. These rulings negate the bulk of Petitioners' arguments.

REASONS FOR DENYING THE WRIT

The decision below is in accord with this Court's precedents. The Colorado Supreme Court appropriately and carefully applied the well-established test this Court has set out for **statutes** regulating the time, place or manner of expressive activity. After a detailed review of the specific operation of the statute at issue, the Colorado courts properly determined that the statute was narrowly tailored, unlike the invalidated injunctive provisions in *Schenck* and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The statute is content-neutral and is not a prior restraint, under the standards established by this Court.

Contrary to Petitioners' assertions, the decision below is not in conflict with the decision of any other lower court. The decisions of the Eighth and Ninth Circuits and the North Dakota Supreme Court cited in the petition struck down statutory or injunctive provisions which operated differently than the statute here.

The decision below does not present new or important questions of constitutional law. Rather, it correctly applies this Court's precedents, recognizing that obstructive, coercive, and threatening conduct in the course of expressive activity may be regulated by reasonable time, place, and manner restrictions. Contrary to Petitioners' assertion, *see* Pet. at 10, it is their own petition that "squarely conflicts" with this Court's decisions. Accordingly, review by this Court is not warranted.

I. THE COLORADO SUPREME COURT'S DECISION IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

Petitioners' arguments for review primarily turn on disputing the test applicable to the challenged statute. As noted above, Respondents believe that the findings of the Colorado Supreme Court confirm that Petitioners have waived such arguments. *See* Pet. App. at 11a, 21a. In addition, Petitioners' arguments are without credibility, as they omit any acknowledgment of this Court's basic jurisprudence concerning statutory regulations of expressive activity.

A. The Colorado Supreme Court Correctly Applied The Well-Settled Test To Determine The Constitutionality Of Statutes Imposing Time, Place Or Manner Restrictions.

This Court's test for the constitutionality of **statutes** which regulate speech has long been settled, and does not require review:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant

> governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). *See also Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 186, 213-14 (1997); *Madsen*, 512 U.S. at 764; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Ward v. Rock Against Racism*, 491 U.S. at 791. The Colorado Supreme Court applied this test, holding that, "on its face, the statute does no more than place reasonable restrictions on speech that (1) are content-neutral, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative means for the communication of information petitioners seek to place in the marketplace of ideas." Pet. App. at 3a; *see also* Pet. App. at 29a.

Petitioners' leading argument rests on a supposed conflict with this Court's decisions in *Schenck* and *Madsen*. Pet. at 9-14. Yet the petition nowhere acknowledges that in those decisions this Court was primarily concerned with articulating, explaining, and applying a more rigorous test for speech-regulating **injunctions**, as distinguished from the established test for **statutes** such as Colorado's. "If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism*. [W]e would determine whether the time, place, and manner regulations were 'narrowly tailored to serve a significant governmental interest.'" *Madsen*, 512 U.S. at 764 (citations omitted).

In contrast, "our standard time, place, and manner analysis **is not sufficiently rigorous** when it comes to evaluating content-neutral **injunctions** that restrict speech." *Schenck*, 519 U.S. at 371, quoting *Madsen*, 512 U.S. at 765 (emphasis added). Therefore, a speech-restrictive injunctive order must be "couched in the narrowest terms that will accomplish [its] pin-pointed objective." *Madsen*, 512 U.S. at 767, quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).[6] At oral argument before the Colorado Supreme Court, Petitioners' counsel admitted that the *Ward* test was the appropriate measure of this statute's constitutionality. Pet. App. at 11a. Petitioners' arguments based on *Schenck* and *Madsen* fail to address the stricter test applied in those decisions. Such arguments are contrary to Petitioners' own admission, and do not merit review by this Court.

Unlike Petitioners, the Colorado Supreme Court clearly understood, followed and applied this Court's precedents concerning the applicable tests:

> [U]pon close examination, we cannot conclude that the test applied in *Schenck* is

6 This Court has long held that a statute is narrowly tailored "so long as [it] promotes a substantial government interest that would be achieved less effectively" in its absence. *Ward*, 491 U.S. at 799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). The validity of such statutes "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests," so long as the statute does not burden substantially more speech than necessary. *Ward*, 491 U.S. at 800, quoting *Albertini*, 472 U.S. at 689. Such statutes cannot be held invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Ward*, 491 U.S. at 797, quoting *Albertini*, 472 U.S. at 689; *see also Turner Broadcasting System*, 520 U.S. at 217-18.

the appropriate standard by which to determine whether section 18-9-122(3) meets constitutional scrutiny. Our inability . . . is based on an important distinction readily drawn between the two cases in the nature of the government regulation. *Schenck* involved a judicially created preliminary injunction drawn solely for the parties before the Court under the circumstances then existing. Here, to the contrary, section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly of the State of Colorado.

As explained by the Supreme Court in *Madsen*, 512 U.S. at 763, one of the differences between judge-drawn injunctions and statutes crafted in the political process is that, "[i]njunctions. . . carry greater risks of censorship and discriminatory application than do general ordinances." As such, the Colorado General Assembly's enactment of section 18-9-122(3), which is . . . intended for general application reaching all citizens, is entitled to greater deference than the judge-made injunction in *Schenck*. See *Madsen*, 512 U.S. at 763 (applying "a somewhat more stringent application of general First Amendment principles" when determining the constitutionality of an injunction). Thus, we conclude that to apply

> the appropriate standard for determining the constitutionality of a content-neutral statute, we rely upon *Ward* and not *Schenck*.

Pet. App. at 18a-19a. On remand, both the Court of Appeals and the Colorado Supreme Court properly re-evaluated whether Colorado's statute was sufficiently narrowly tailored under the less strict test applicable to statutes, while considering the factors discussed in *Schenck*, and determined that the statute survived constitutional scrutiny. The Colorado courts' examination of narrow tailoring rests on no new principles of law and does not require review by this Court.

The petition consistently exaggerates the reach of this narrowly tailored statute, contrary to the authoritative interpretation of the Colorado Supreme Court. *See* Pet. App. at 24a-25a. It represents that under the statute, a demonstrator near health care facilities must seek consent of "passersby" within eight feet before demonstrating. Petition at i. In reality, under the statute the only person who must consent is the individual target of the expressive activity who is **approached** in the course of that activity. *See* Pet App. at 24a-28a. Passersby who are not individually approached cannot invoke the statute.

B. The Decision Below Is Consistent With *Schenck* And *Madsen*.

The Colorado Supreme Court stated specifically that its review was "necessarily informed by the Supreme Court's opinion in *Schenck v. Pro-Choice Network*." Pet. App. at 3a. The court carefully analyzed this Court's ruling

in *Schenck* and scrutinized Colorado's statute for the flaws found in the *Schenck* injunction:

> [I]n *Schenck* the Supreme Court did not strike down all "floating" buffer zones per se, as the petitioners essentially contend. In striking down the floating buffer zones created by the injunction in *Schenck*, the Court recognized that "there may well be other ways to both effect. . . separation and yet provide certainty (so that speech protected by the injunction's terms is not burdened). . . ." 519 U.S. at 378-79. In fact, it was the uncertainty of how to comply with the injunction about which the Supreme Court appeared most concerned. The Court stated that because the protester would have to move with the individual, and because the clinic sidewalks were only seventeen-feet wide, "it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 378.

Here, in contrast, the statute is so narrowly drawn that these concerns are alleviated. First, protesters must only maintain a distance of eight feet, not fifteen, which allows for normal conversational tones. Second, where in *Schenck* a protester could

have easily violated the injunction merely by standing still if, for example, an individual approached a protester, then that protester would violate the injunction. Here, in contrast, the mens rea "knowingly" requirement ensures that scenario will not be possible. Even if a protester is approached by an individual, the protester will only violate the statute if, along with the several other requirements of the statute, he or she "knowingly approaches" the individual for the purpose of passing a leaflet or engaging in oral protest. The inadvertent violation, or at least the possibility of such a violation, is substantially avoided by the plain terms of the statute. In *Schenck*, in order to avoid violating the injunction, the protesters were obligated to maintain sufficient separation of fifteen feet at all times. There, the movement of a third party could place the protesters in the position of having violated the injunction. Here, to the contrary, petitioners may actually stand still and though individuals may approach within eight feet of petitioners, the requisite actus reus of "approach[ing]" is not met. **Thus, we do not believe that, even under the *Schenck* test, section 18-9-122(3) burdens more speech than is necessary.**

Pet. App. at 27a-28a (emphasis added). Thus, the Colorado Supreme Court first authoritatively interpreted the operation of the statute -- the job of a state court of last

resort -- and then carefully scrutinized the statute to assure that it was narrowly tailored. Petitioners' arguments implicitly dispute the Colorado Supreme Court's interpretation, seeking to rewrite the statute into one of broader application, in order to bolster their further disagreement with the court over the narrowness of the statute's tailoring. Such sophistry does not merit review.

Further, the petition seizes on one aspect of *Schenck* without consideration of the rest of *Schenck*, which supports the decision below. *Schenck* evaluated the constitutionality of three provisions of an injunction which controlled anti-abortion demonstrations immediately outside clinics. Provisions which were not challenged prohibited "trespassing on, sitting in, blocking, impeding, or obstructing" access; "physically abusing, grabbing, touching, pushing, shoving, or crowding" patients and staff; and the use of sound amplification. 519 U.S. at 366, n. 3. The challenged provisions prohibited:

> (b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways or driveway entrances of such facilities [the "**fixed buffer zone**"], or within fifteen feet of any person or vehicle seeking access to or leaving such facilities [the "**floating buffer zone**"], except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

> (c) [S]idewalk counseling consisting of conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility [the "**cease and desist provision**"].

Id.[7] The 15-foot fixed buffer zone passed even the rigorous test for injunctions. Because of the previous history of interference with clinic access, "the only way to ensure access was to move back the demonstrations." *Id.* at 380. This Court declined to "quibble" about the precise distance required, deferring to the district court's

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[7] The *Schenck* Court summarily disposed of a number of arguments, ruling that these provisions were not a prior restraint, *id.* at 374, n.6; were not content-discriminatory, *id.* at 384-85; and were not vague, *id.* at 383. It also found that the governmental interests underlying the injunction -- "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy related services" -- were "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics." *Id.* at 376 (footnote omitted).

"reasonable assessment of the number of feet necessary" to ensure access. *Id.* at 381. The demonstrators argued that the other unchallenged provisions prohibiting impeding access were all that was necessary, but this Court rejected this argument, finding that it was reasonable to conclude that demonstrators would continue to "aggressively follow and crowd individuals right up to the clinic door and then refuse to move." *Id.* at 381-82. Therefore, the "prophylactic measure" of the additional space created by the fixed buffer zone was appropriate. *Id.* at 382.

The operation of the cease and desist provision within the fixed buffer zone did not detract from *Schenck's* conclusion. This Court noted that the District Court's decision to allow two sidewalk counselors inside the buffer zones was clearly "an effort to bend over backwards" to accommodate expression. *Id.* At 381, n. 11. Because the District Court was entitled to conclude on the record that the only feasible way to protect access would have been to keep the entire buffer zone completely clear, "the District Court's extra effort to enhance defendants' speech rights by allowing an exception to the fixed buffer zone should not redound to the detriment of respondents." *Id.*

Colorado's statute operates similarly to the fixed buffer zone *Schenck* upheld. Although the statute's 100-foot fixed buffer zone is larger than *Schenck's* 15-foot fixed buffer zone, it also allows far more activity within it. Instead of only two sidewalk counselors who must immediately withdraw outside the fixed buffer zone if **anyone** requires them to, Colorado's statute allows an unlimited number of demonstrators within the buffer zone,

who must stop their approach only at eight feet, and only if their target audience does not consent. Like the injunction in *Schenck*, the statute rests on the reasonable assumption that without such a prophylactic measure, demonstrators would continue to crowd people right up to clinic doors, effectively impeding access.[8] In addition, Colorado's statute applies only to a **knowing approach**. Therefore, unlike *Schenck*, a successful prosecution could not be based upon an inadvertent violation.[9] A demonstrator is not required to back up from an approaching person, but simply stand still and refrain from lunging at the target of his speech. These carefully tailored provisions control crowding and threatening, like the fixed buffer zone with the cease and desist provision upheld in *Schenck*, without creating the "substantial risk of burdening more speech than [its] terms prohibit," *see* 519 U.S. at 378, which invalidated the *Schenck* 15-foot floating buffer zone.

The petition also argues that the decision below is inconsistent with *Madsen*, where this Court invalidated an injunctive provision supposedly "substantially similar" to the statute at issue here. Pet. at 12. In reality, the injunctive provision struck down was far broader than Colorado's statute and, as noted above, was analyzed under a stricter test. Further, *Madsen* upheld a method of preserving access to health care more restrictive than the statute here, imposing a 36-foot "speech-free buffer zone" around a medical clinic. 512 U.S. at 768-770. Therefore, *Madsen's*

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8 *See* R. 674: "Eight feet is far enough so that you can't get up into someone's face and stop them from moving." (Statement of sponsor.) *See also* R. 224, 232, 718-20.

9 Petitioners conceded at oral argument that inadvertent violations of the statute caused by a third party were not a legitimate threat. *See* Pet. App. at 25a.

reasoning could support an eight-foot "speech-free buffer zone" around patients near health care facilities. The decision below, approving an even less restrictive alternative that allows speech within the buffer zone with a willing listener, is even more clearly consistent with *Madsen*.

Petitioners focus on a different provision of the injunction in *Madsen*, which prohibited "physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate," in an area within 300 feet of the Clinic. *Id.* at 760. This provision included no proximity requirement for the prohibited "approach" within the 300-foot zone, so that a demonstrator who took one step towards a patient across the street from him would be in violation. Further, access to the clinic was already protected by other provisions of the injunction, including the 36-foot speech-free buffer zone. Thus, under the more stringent standard imposed on an injunction, this Court found that the provision burdened "more speech than is necessary to prevent intimidation and to ensure access to the clinic," improperly preventing all approaches "regardless of how peaceful the contact may be." *Id.* at 774.

Colorado's statute, however, applies only within eight feet -- the last two or three steps before physical contact occurs. A focused, targeted approach by a stranger shouting slogans at a distance closer than eight feet is experienced by most people as "so infused with violence as to be indistinguishable from a threat of physical harm." *Id.*; *see* R. at 195-96, 229-230. Thus, because both the facts and the legal standard concerning the *Madsen* "no-approach"

provision were different, the decision below does not conflict with *Madsen*.

Petitioners essentially argue that *Madsen's* invalidation of the no-approach provision mandates that any and all consent requirements be struck down. This argument is contrary to *Schenck*. The petitioners in *Schenck*[10] argued that *Madsen's* disapproval of the 300-foot "no-approach zone" required disapproval of *Schenck's* consent-based "cease and desist" provision. The *Schenck* Court, however, upheld the cease and desist provision, remarking that the broad no-approach zone in *Madsen* was "easily distinguishable." 519 U.S. at 384, n.12. Colorado's narrowly tailored statute is likewise easily distinguishable from *Madsen's* broad no-approach zone, applying only within a narrow, precisely defined zone to obstructive and threatening approaches.

Because the statute's provisions are narrowly drawn, they would pass constitutional muster even under the more rigorous test for injunctions articulated in *Schenck* and *Madsen*. Accordingly, the Colorado Supreme Court properly determined that the statute was constitutional under the standard test for statutes.

C. The Statute Is Content-Neutral.

Petitioners argue that the Colorado Supreme Court should have applied strict scrutiny because they believe the statute is content- or viewpoint-based. Pet. at 15-16. As noted above, Respondents believe that this argument has not been properly preserved for review. The Colorado Supreme

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10 Represented by counsel who are representing Petitioners here.

Court found that the statue was content-neutral and stated that, "the petitioners do not contend otherwise in this appeal." Pet. App. at 21a. In any case, the argument is based on a definition of content-neutrality not found in this Court's precedents and is directly contradicted by *Schenck* and *Madsen*; accordingly, it does not merit this Court's review.

The applicable standard for determining content neutrality is well-established:

> The principle inquiry in determining content neutrality. . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward, 491 U.S. at 791 (citations and quotation marks omitted); *see also Madsen*, 512 U.S. at 763. The statute here meets that test. Like the injunctions held content-neutral in *Schenck* and *Madsen*, it is directed at harmful **conduct** by demonstrators, regardless of their viewpoint. *Schenck*, 519 U.S. at 384-85; *Madsen*, 512 U.S. at 762-64. It is not the content of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education,

or counseling" but the threatening and intimidating close **approach** while engaging in these expressive activities which is prohibited.

Petitioners apparently do not dispute that the leafleting and sign provisions are content-neutral, but assert that the statute's reference to "oral protest, education, or counseling" is improperly content-based. Pet. at 15. This argument is inconsistent with the cases cited by Petitioners, which discuss either viewpoint or subject matter discrimination. As authoritatively construed by the Colorado Supreme Court, the statute's restrictions "apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Pet. App. at 22a. Contrast this with *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992), striking down a "bias-motivated crime" ordinance that expressly applied to only one side of a debate. Further, the statute does not apply to only speech on a particular topic, such as labor, *see Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455, 461 (1980), or politics, *see Boos v. Barry*, 485 U.S. 312, 318-19 (1988); *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

Petitioners also allege that because individuals who are approached by demonstrators may withhold their consent for closer approaches, the statute hinges on improper, content-based "audience reaction." Pet. at 15. This argument is not supported by this Court's decisions. An improper "heckler's veto," where a hostile mob attempts to force a speaker out of an entire forum, *cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), is not analogous to allowing a medical patient to keep an aggressive demonstrator at arm's length.

Petitioners' arguments that the statute is both content- and viewpoint-discriminatory are contrary to the very decisions they rely upon. In *Schenck*, this Court rejected a very similar argument that the consent-based cease and desist provision was content-discriminatory, holding that the injunction was addressed only to the **conduct** of demonstrators, and they remained free to espouse their message outside the buffer zones. 519 U.S. at 384-85; *see also Madsen*, 512 U.S. at 762-64.[11] Similarly, the statute here addresses conduct and leaves demonstrators free to espouse their message.

Finally, the record clearly demonstrates the statute's content-neutrality. As the bill's sponsor expressly stated: "We're not telling people what they can say. They can say anything that, that they want." R. 698. During the floor debate another representative explained the statute: "I don't care what side you're on. If you're pro or con, stay back eight feet." R. 699. The court below followed this Court's precedents in determining that the statute is content-neutral.

D. The Decision Below Merely Applies A Long-Settled Definition Of Prior Restraint.

Petitioners assert that the statute is an invalid prior restraint. Pet. at 17. Because Petitioners agreed at oral argument before the Colorado Supreme Court that the

11 In *Sabelko v. City of Phoenix*, 120 F.2d 161 (9th Cir. 1997), which Petitioners have also cited in their petition as supposedly in conflict with the Colorado Supreme Court's decision, the Ninth Circuit found that the challenged ordinance, which described the conduct it regulated in words almost identical to those in Colorado's statute, was content-neutral. 120 F.3d at 164.

Ward test (a different test from that applicable to prior restraints) was the appropriate test for the statute, *see* Pet. App. at 11a, this issue is not properly before the Court. In any case, *Schenck* and *Madsen* squarely answer this argument, holding that there is no prior restraint if "alternative channels of communication [are] left open," 519 U.S. at 374, n.6, and demonstrators "are not prevented from expressing their message in any one of several different ways; they are simply prevented from expressing it within [an appropriate] buffer zone." *Madsen*, 512 U.S. at 763, n.2. Under the statute here demonstrators may express their messages in any one of a number of ways; they are simply prohibited from expressing them by approaching unconsenting targets within the eight-foot bubble. The statute is not a prior restraint.

The petition simply ignores this Court's definition of prior restraints as regulations that give "**public officials** the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (emphasis added).[12] A statute creating a limited buffer zone to allow medical patients to escape obstructive, in-your-face harangues is simply not analogous to the actions of a government censor denying access to an entire forum. It is a "fundamental tenet of our

12 *See also Riley v. National Federation of the Blind, Inc.* 487 U.S. 781, 802 n.14 (1988) ("Secretary of State has unbridled discretion"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) ("unbridled discretion of a government official"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (same); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 964 n. 12 (1984) ("unguided discretion of the Secretary of State"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) ("licensing officials" had unbridled discretion); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("overly broad licensing discretion to an administrative office"); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("such broad discretion in a public official").

Constitution. . . that the government is subject to constraints which private persons are not," *ISKCON v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J. concurring). Petitioners have not cited a single authority applying the prior restraint doctrine to the decisions of private individuals. It is Petitioners who seek to make new law, outside the precedents of this court. Such arguments do not require review.

II. THE STATUTE IS CONSISTENT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL CIRCUIT COURTS.

A. The Ninth Circuit Evaluated A City Ordinance That Operated Differently Than The Statute Here.

In *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), the Ninth Circuit Court of Appeals invalidated an ordinance that shared virtually all the uncertainties that led to the invalidation of the floating buffer zone in *Schenck*. The Phoenix floating buffer zone applied to many individuals at once, requiring a demonstrator to constantly monitor his or her distance and creating a high amount of uncertainty. 120 F.3d at 165. There is nothing in the Ninth Circuit's opinion, however, which suggests that the court sweepingly "rejected the legislative imposition of floating bubble zones," as Petitioners allege. Pet. at 22. Rather, the court evaluated a specific floating buffer zone and determined that it "lack[ed] the narrow tailoring necessary to survive our scrutiny." 120 F.3d at 165.

Thus the Colorado Supreme Court's decision is not in conflict with *Sabelko*, because the statute here operates

differently than the Phoenix ordinance. As the Colorado Supreme Court explained, Colorado's statute does not create the unnecessarily speech-chilling uncertainty of the Phoenix ordinance, because a violation both requires an affirmative "approach" by the demonstrator and hinges on the "knowing" intent of the demonstrator. Pet. App. at 20a-21a, 25a. A demonstrator cannot violate the statute inadvertently, but only through intentional actions under the demonstrator's control. Courts are not in conflict when they reach differing results in evaluating differing legislative enactments.

B. The Eighth Circuit And The North Dakota Supreme Court Evaluated Provisions With No Similarity To The Statute At Issue Here.

Petitioners assert that the decision below conflicts with *United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), and *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). Pet. at 22-24. Those decisions, however, invalidated far broader restrictions on speech, with little relation to the challenged statute in this case, under more stringent standards, and thus their holdings are not in conflict with the decision below.

In *IBP*, the Eighth Circuit addressed the constitutionality of a Nebraska labor picketing statute, which prohibited, among other activities:

> Using threatening language toward [another] person or any member of his or her immediate family, or in his, her or their

> presence or hearing, for the purpose of inducing or influencing, or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose.

857 F.2d at 425 n.4. Thus the statute imposed an unlimited ban on speech, with no place restrictions, and was expressly content-discriminatory. *See Boos v. Barry*, 485 U.S. at 321 (such regulations subject to exacting scrutiny). Contrary to Petitioners' assertions, the statute was not defended on the grounds that "unwelcome words are unprotected," Pet. at 23, but that it applied only to "fighting words." *Id.* at 433. The Eighth Circuit declined to so drastically rewrite the statute, and so agreed with the district court that the provision was improperly content-based. *Id.* at 424, 435. Nothing in the circuit court's analysis in *IBP* is concerned with the constitutionality of a narrow place restriction like that in the statute here.

In *Fargo Women's Health*, the North Dakota Supreme Court considered the constitutionality of an injunction restricting protests outside an abortion clinic. The court upheld most of the injunction, but struck down a provision which prohibited "speaking to staff and patients of [the clinic] who indicate that they do not wish to be spoken to." 488 N.W.2d at 407 n.1. The court's entire analysis was contained in one sentence: "However, 'speaking' to staff and patients cannot be constitutionally enjoined." *Id.* at 411. The injunction also prohibited

"distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature." *Id.* at 407 n.1. Again, the court struck this down with a one-sentence analysis: "Obviously, distributing literature is protected communicative activity and a complete ban violates the First Amendment." *Id.* at 411.

The injunctive provisions stricken in *Fargo Women's Health* contained no place limitations whatsoever, unlike the statute here. Further, in the same decision the North Dakota Supreme Court upheld a prohibition against "harassing" or "intimidating" patients and staff, *id.* at 410-11; following a remand for more factual findings, it also upheld a provision of the injunction which excluded all but two peaceful picketers from a "protected zone" extending 100 feet from the clinic property line. *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 502 N.W.2d 536, 538 (N.D. 1993). Thus, the decisions of the North Dakota Supreme Court are consistent with the narrow eight-foot restriction upheld below.

The decision below is in fact consistent with many other decisions of the courts of appeals and state courts of last resort, upholding various buffer zones as necessary to protect access to clinics and to protect patients from undue stress. *See, e.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402 (Cal. 1995), *cert. denied*, 520 U.S. 1133 (1997) (upholding injunction which placed demonstrators more than 60 feet from clinic sidewalk, across a busy four-lane street); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (upholding 25 foot "free zone"); *Hirsh v. City of Atlanta*, 401 S.E.2d 530 (Ga.), *cert. denied*, 501 U.S. 1221

and 502 U.S. 818 (1991) (upholding injunction imposing five-foot bubble within 50 feet of clinic property), *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) (upholding injunction which placed demonstrators around the corner from clinic entrance). There is no conflict between the decision below and decisions of other courts which would necessitate review by this Court.

III. THE DECISION BELOW PRESENTS NO NEW OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW.

Petitioners argue that this case presents important principles of constitutional law needing resolution by this Court. Pet. at 24-26. In reality, Petitioners seek review of a statute and a decision which simply applied previous precedents of this Court. Further, Petitioners rely on exaggerated statements of the statute's sweep, contrary to the definitive interpretation of the Colorado Supreme Court.

Petitioners attack the statute because it does not protect access by prohibiting obstructions, trespass, assaults or threats, arguing that Colorado's "true interest" is "suppressing free speech." Pet. at 25. The record below shows that the Colorado General Assembly was not seeking to suppress speech, but to protect health care access. R. 620-21, 673-74, 683-84, 698-700. As discussed above, the statute specifically targets obstructive and threatening conduct combined with speech. The Colorado General Assembly determined that, in addition to prohibitions against physical obstructions, assaults, and the like, an additional "prophylactic measure," *see Schenck*, 519 U.S. at

382, or "buffer zone, " *see Madsen*, 512 U.S. at 770, was necessary to preserve unfettered access to health care facilities. Although Petitioners might write a different statute, their disagreement with the reasonable means chosen by the Colorado General Assembly is not sufficient reason for this Court's review. *See Ward*, 491 U.S. at 800; *Turner Broadcasting System*, 520 U.S. at 193-194, 211-12.

The Colorado courts applied the well-settled test for statutes, which the petition neglects to even recognize.[13] The statute was carefully scrutinized for any of the infirmities which invalidated the *Schenck* injunctive floating buffer zone, and none were found. As noted above, buffer zones previously approved by this Court are a more restrictive means of preserving access to health care. There is no need to review Colorado's decision to employ an even narrower restriction, which prohibits unconsented approaches that are tantamount to threats, while preserving the ability to "reach the minds of willing listeners." *See Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

The statute at issue will not prohibit parades, or create broad "audience veto" powers. *See* Pet. at 25. It will, however, prevent coercive blockades. This is consistent with this Court's decisions, which have long recognized that, "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Demonstrators may not "insist upon a

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13 Petitioners go so far as to imply that injunctions should be evaluated under a less stringent standard than statutes, Pet. at 26, an argument definitively rejected by *Madsen*, 512 U.S. at 766-67.

constitutional right to form a cordon across the street and allow no pedestrian to pass who did not accept a tendered leaflet." *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). There is "a substantial and justifiable" state interest in regulating speech "directed primarily at those who are presumptively unwilling to receive it." *Frisby v. Schultz*, 487 U.S. at 488.

The use of a consent requirement to balance competing rights is in accord with this Court's decisions. *Rowan v. U.S. Post Office*, 397 U.S. 728 (1970), upheld a statute which allowed an individual to invoke the power of the Post Office to prohibit delivery of mail which the individual found offensive, noting that leaving the decision to the individual avoided "constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official." 397 U.S. at 737.

Consistent with this Court's pronouncements, the decision below recognizes that those outside health care facilities must still "tolerate insulting, and even outrageous, speech," *see Madsen*, 512 U.S. at 774, but from eight feet away, decreasing obstructions and threats without cutting off communication. The statute is fully consistent with the law of this Court:

> For the right to communicate is not limitless. Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. . . . Moreover, we have often declared that "[a] state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech *irrespective of content*." In sum, "no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquillity of spots selected by the people either for homes. . . or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals."

Carey v. Brown, 447 U.S. 455, 470-71 (1980) (citations omitted). Colorado's statute is a legitimate exercise of the state's authority to restrict threatening conduct immediately outside health care facilities. The Colorado Supreme Court properly evaluated and upheld the statute after applying the well-settled test for such statutes and scrutinizing it for the flaws found in the *Schenck* injunction. There is nothing in the decision below that requires review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

KEN SALAZAR
Attorney General
MICHAEL E. McLACHLAN
Solicitor General
FELICITY HANNAY
Deputy Attorney General
CAROL D. ANGEL*
Senior Assistant Attorney General
Natural Resources and

ROGER W. NOONAN
MAUREEN HERR JURAN
GORSUCH KIRGIS LLP
1515 Arapahoe Street
Suite 1000
Denver, Colorado 80202
Telephone: (303) 376-5000
Attorneys for City of Lakewood

Environment Section
Attorneys for Ken Salazar and
State of Colorado
1525 Sherman Street, 5th Fl.
Denver, Colorado 80203
Telephone: (303) 866-5016
FAX: (303) 866-3558
Counsel of Record

Supreme Court, U.S.
FILED
AUG 2 1999
CLERK

No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Colorado Supreme Court

REPLY TO BRIEF IN OPPOSITION

THOMAS P. MONAGHAN
NEW HOPE LIFE CENTER, ACLJ—NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 609
Washington, DC 20007
(202) 337-2273

* *Counsel of Record*

Attorneys for Petitioners

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INTRODUCTION

Under the Colorado statute challenged herein, it is a crime to approach and hand a person a leaflet on a public sidewalk unless that person first consents.

In their Brief in Opposition ("Opp."), Respondents do not deny that the challenged statute restricts the exercise of fundamental, constitutionally protected rights of speech, press, and assembly. Nor do they deny that the Colorado's Floating Bubble Zone statute operates in traditional public forum properties – sidewalks, streets, and public passages – within which constitutional freedoms of expression are at their high water mark and the power of government to restrain the ordered exercise of such rights is at its lowest ebb. Instead, Respondents only seek to justify the most sweeping abrogation of constitutionally protected expression currently in force in the United States. For the reasons set forth herein, the petition for a writ of certiorari should be granted.

REPLY ARGUMENT

1.a. To justify one of the most sweeping bans of protected expression in public places ever enacted by a state legislature, Colorado asks this Court to consider the legislative history of Colorado's Floating Bubble Zone Statute. *See* Opp. at 1 (citing to legislative history). Examination of that legislative history, however, leads to an obvious conclusion about Colorado's startlingly overbroad restriction on speech: none of Petitioners was identified therein as a wrongdoer whose conduct justified such sweeping interference with cherished constitutional freedoms. Instead, as with the vast majority of Coloradans whose rights have been diminished by the statute, Petitioners are innocents who have been caught up in the tangled web cast by the Colorado General Assembly. Thus, unlike the protesters in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), these Petitioners have, *without cause*, been denied the right to distribute free literature, to display signs to passersby, and to utter any words that a jury might consider to be

"oral protest," "oral counsel," or "oral education."

1.b. Respondents ignore the nature of Petitioners' suit and the text of the statute. Although the Colorado General Assembly included in the same enactment a provision prohibiting obstruction of access to medical facilities, *see* C.R.S. § 18-9-122(2), Pet. App. 65a, Petitioners have not challenged that portion of the statute. It is not contended by Respondents or by the court below that Petitioners seek to carry out physically obstructive blockades of health care facilities.

Respondents contend that "this statute was enacted . . . for the express purpose of safeguarding access to health care clinics" that had been previously prevented by "direct physical blockades," and by protestors "surrounding, crowding, yelling at, grabbing, pushing, shoving, hitting, and spitting on those seeking access . . . ." Opp. at 1. Petitioners have never disputed that such obstructive conduct is subject to legislative regulation. Petitioners challenge C.R.S. § 18-9-122(3), Pet. App. 65a, however, because that statutory section ignores the problems of protesters "surrounding, crowding, yelling at, grabbing, pushing, shoving, hitting, and spitting on those seeking access." Instead, the Colorado's Floating Bubble Zone statute focuses on the "problems" of free literature, sign displays, and public discussion.

1.c. Respondents misstate the operation of the statute and its effect on Petitioners' exercise of fundamental, constitutionally protected rights.

The statute expressly prohibits approaching within eight feet of another person, while within 100 feet of any entrance to a health care facility, for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person. *See* C.R.S. § 18-9-122(3), Pet. App. 65a. Of that restriction, Respondents assert that it does not abridge Petitioners' free speech and free press rights to communicate with *passersby*. *See* Opp. at 2. But in fact, as Petitioners walk through

the zones created by the statute,[1] they are no longer at liberty simply to hold up a sign for others to see as they pass them by or to hold out their hands with pamphlets or publications for the other person to take if they desire. To do so, without obtaining express consent from a distance of greater than eight feet, is to commit a misdemeanor criminal offense.

Respondents' statement of the case also fails to take into account the nature of Petitioners' expressive activities. *Cf.* Petition at 2-4 (describing those activities). Respondents fail to comprehend that the display of a sign, the offer of a leaflet, and the utterance of oral protest, counsel or education, may each target more than one person at a time. Simpson's principal expressive activity, displaying a "sandwich board" style sign, reaches many groups and individuals simultaneously as Simpson

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1. There is no disputing that the enactment of the statute has interfered with Petitioners' communicative activities. *See* Opp. at 2 n.4; *cf.* Petition at 3-4 (and accompanying footnotes) (discussing impact of statute on Petitioners' expressive activities). Simpson has discontinued entering into the areas affected by the 100 foot zones around entrances to health care facilities. *See* Opp. at 2 n.4. Hill and Himmelmann have had to surrender the rights to free speech and free press that they formerly enjoyed and only are able to proceed into the zones with "great caution and circumspection." *Id.* While within the 100 foot zones, Hill and Himmelmann have encountered great difficulty in complying with the floating bubble zones surrounding the many groups of people that walk together on the sidewalks and public ways and the many individuals present in these locations at one time. *Id.*

In opposition, Respondents state, "[t]he Petitioners have all demonstrated outside health care facilities for a number of years, yet none of them have ever been cited, detained, arrested or referred for prosecution under . . . the statute . . . ." *See* Opp. at 2 n.4. The reason for Petitioners' avoidance of prosecution is obvious. Petitioners have complied with the terms of the statute, despite its injurious impact on their expressive activities, to avoid prosecution while they challenge the statute through this litigation.

approaches them. Hill and Himmelmann's offers of free literature and expression of words of protest, counsel and education are broadcast to more than one auditor or recipient at a time.[2] Where an orator seeks to utter works that constitute protest, counsel, or education, while walking on the public sidewalks, that orator is transformed by the challenged statute into a petty criminal if he fails to obtain consent before coming within eight feet of each and every person to whom he seeks to communicate. In each of these circumstances, communications intended to reach multiple individuals simultaneously are restrained unless and until the consent of each is obtained.

1.d. Respondents assert that certain unidentified arguments of Petitioners "do not appear to have been preserved for review by this Court."[3] *See* Opp. at 3. Respondents' assertion is demonstrably not well-taken.

First, the questions presented in the Petition, *see* Petition at i, have already been shown to be fully preserved for review by this Court. *See* Petition at 4-9.

Second, review of the application for review on certiorari filed below and the ruling thereon by the Colorado Supreme Court confirms that Respondents' blank assertion is wrong. Review of a judgment of the Colorado Court of Appeals is sought from the Colorado Supreme Court by filing a petition for a writ of certiorari. *See* Colorado Appellate Rules ("C.A.R.") 49. The

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2. Even if every effort of communication only targeted one person at a time, the statute's impact on speech would be unconstitutional.

3. Respondents did not make this argument in opposition to the previous petition filed in this Court in this litigation. *See generally* Brief in Opposition to the Petition for Writ of Certiorari, *Hill v. Colorado*, No. 95-1905. Consequently, it would seem, that undeveloped argument refers only to matters subsequent to this Court's prior decision in this matter.

contents of a petition for a writ of certiorari are set by those same rules. Rule 53 obliges petitioners to include in their petitions

> [a]n advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. *Only the issues set forth or clearly comprised therein will be considered.*

C.A.R. 53 (emphasis added). In compliance with that rule, Petitioners included such an advisory listing of issues in their petition filed with the Colorado Supreme Court.[4] That advisory

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4. The advisory listing of issues presented in the Petition to the Colorado Supreme Court included:

1. Whether the Colorado Court of Appeals erred by affirming the constitutionality of the Statute:

   a. because the Statute employs the "consent" requirement rejected by the United States Supreme Court in Madsen v. Women's Health Center, 512 U.S. 753, 773-74(1994); and,

   b. because the Statute creates floating speech-free zones rejected by the United States Supreme Court in Schenck v. Pro-Choice Network, 117 S. Ct. 855, 867 (1997)?

2. Whether the Colorado Court of Appeals erred by concluding that the Statute

   a. does not impose or permit content- or viewpoint-based prohibitions of speech?

   b. is not substantially overbroad or unconstitutionally vague?

   c. is not an unconstitutional prior restraint on free speech and press?

   d. is narrowly tailored?

3. Whether the Statute is unconstitutional because it

listing of issues identified every federal question proposed in the pending Petition for a Writ of Certiorari. The court below granted review on its own restated question but specifically denied review on each issue presented in the Petition. *See* Pet. at 8 n.15; Pet. App. at 58a-59a.

Respondents refer to language from the decision below asserting that counsel for Petitioners had conceded that the reasonable time, place and manner test was the appropriate one for analyzing the statute. *See* Opp. at 3; *cf.* Pet. App. at 11a (court's statement that counsel had conceded the point). The problem with the assertion by Respondents is that the court below misstated counsel's argument. *See* Addendum to Reply at 2a. During oral argument, Petitioners' counsel was asked whether the reasonable time, place and manner test was the appropriate one. *Id.* Petitioners' counsel replied that the court below had specifically refused the application for review on Petitioners' claim that the challenged statute embodied content-based decision-making. *Id.*

Clearly, Petitioners preserved below each federal question presented here. The court below simply refused to consider any of those issues in its disposition of the matter.

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a. omits the procedural safeguards required in a system of prior restraints?

b. omits standards to prevent content- or viewpoint-based restrictions on speech?

c. violates the Petitioners' rights to equal protection of the laws?

4. Whether Colorado may subject the exercise of state and federal constitutional rights to the vetoes of private citizens?

See Petition for a Writ of Certiorari at 1-2, *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999).

2.a. Respondents fail to distinguish Colorado's Floating Bubble Zone statute from the relevant holdings in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997), and in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994). In *Schenck*, because the "broad speech prohibition 'float[ed,]'" this Court concluded that the restriction was "unsustainable on th[e] record." *Id.* at 377. In *Madsen*, this Court declared, "[t]he 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." 512 U.S. at 774. Here, Petitioners and all Coloradans are subjected to the specific defective restrictions struck by this Court in *Schenck* and in *Madsen*: the Colorado Floating Bubble Zone statute creates speech-free zones that float and that impose a consent-to-speak requirement.

2.b. Respondents erroneously assert that the statute is content-neutral. The statute imposes a requirement of consent to speak, punishes the failure to comply as a misdemeanor, and fails to prohibit content- and viewpoint-based denials of the rights to free speech, free press and peaceable assembly. While the courts below have authoritatively construed the statute, despite its clear terms, to apply to all expression near health care facilities, that construction did not alter the balance of power established by the statute: speakers must have consent from private persons who may withhold consent because of disapproval of content or view.

2.c. Respondents assert that the Colorado Floating Bubble Zone statute is narrowly tailored and so distinguishable from the consent provision struck in *Madsen*. *See* Opp. at 17. The challenged provision is anything but narrowly tailored. It is not limited to the protection of persons entering or leaving health care facilities or their companions. It envelopes *everyone* who passes through the 100-foot zone around the entrance doors to such

facilities. It is not limited in its application to offensive contact or threatening language. It applies to virtually the universe of constitutionally protected expression. Nor is the statute limited in its application to persons responsible for unlawful conduct. Unlike the protesters in *Schenck* and *Madsen*, there is no history of unlawful conduct or abuse by Petitioners or by the many Coloradans now subjected to the statutory rule of silence.

3.a. Respondents contend that the issue of prior restraint is not preserved for review by this Court. Petitioners have demonstrated that they sought review on that issue below. *See* Argument 1.d. and accompanying footnotes, *supra*. The court below specifically refused to consider this issue.

3.b. Respondents contend that the sort of restraint embodied in the challenged statute is not within the scope of this Court's prior restraint doctrine. The purported point of distinction is that the statute designates private parties as censors, whereas this Court's other prior restraint cases have involved the designation of government officers and offices as censors. *See* Opp. 21-22. This purported distinction is insignificant.

Colorado's statute subjects the rights to free speech, free press and peaceable assembly to the requirement of consent. The statute omits standards to guide private decisions on requests for consent. Failure to comply with the statute is a criminal offense. There is no significant point of distinction between the systems of prior restraint previously addressed by this Court and the Colorado Floating Bubble Zone scheme.

4.a. Although Respondents' dispute that there is a conflict between the judgment below and the decision in *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), their argument is not well-taken. The Phoenix zones, which at least allowed speech initially, until a person requested that the speaker "back off," were

stricken by the United States Court of Appeals for the Ninth Circuit. The broader zones in Colorado, that operate in advance of expression, were upheld by the court below. Moreover, Respondents simply ignore the other decision of the Ninth Circuit with which the judgment below conflicts, *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1217 (9th Cir. 1998). *See* Petition at 22 n.20.

4.b. Respondents dispute the conflict with the decision of the United States Court of Appeals for the Eighth Circuit. *See* Opp. at 23-24. The Eighth Circuit concluded that a Nebraska statute that prohibited persisting in communicating against the will of another was unconstitutional. *See United Food and Commercial Worker's Int'l Union v. IBP*, 857 F.2d 422, 426 (8th Cir. 1988) (citing statute). Under the statute at issue here, it is a crime to continue to speak to others when they have denied or withheld their consent to speak. Respondents fail to dissipate the conflict created by the judgment below with the decision of the Eighth Circuit.

4.c. Respondents also dispute the conflict with the decision of the North Dakota Supreme Court in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). That decision struck down an injunctive ban on "speaking to staff and patients of [the health care facility] who indicate that they do not wish to be spoken to." 488 N.W.2d at 407 n.1. Here, the challenged statute specifically criminalizes communicating with *anyone* who withholds or denies consent for such communications.

5. Respondents accurately conclude that Petitioners suggest that the Colorado Floating Bubble Zone statute should be subjected to more stringent scrutiny than is applied to injunctive restrictions on expression. While the statute does embody a legislative judgment, that judgment imposes a broad, sweeping

ban on all constitutionally significant expression on public sidewalks and streets near every health care facility in Colorado. Everyone within the zones is covered by the statute, whether seeking access to health care facilities or not. All persons who seek to display signs, pass leaflets, or orally educate, counsel or protest are compelled to observe the zones, even though they have never obstructed access to such facilities and do not seek to do so. Such an overbroad provision certainly warrants closer inspection than an injunction imposed in response to pervasive lawlessness.

CONCLUSION

The petition should be granted.

Respectfully submitted,

THOMAS P. MONAGHAN
NEW HOPE LIFE CENTER,
ACLJ—NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 609
Washington, DC 20007
(202) 337-2273

* *Counsel of Record*

Attorneys for Petitioners

July 2, 1999

ADDENDUM

[The following is an uncertified excerpt from the oral argument before the Colorado Supreme Court. This transcript was prepared from the audio track of an unofficial videotape recording made by public school officials hosting the Colorado Supreme Court's argument session. The Colorado Supreme Court's audiotape recording of the argument was defectively prepared and inaudible.]

MR. HENDERSON: Madam Chief Justice, may it please the Court, by its enactment of CRS 18-9-122, Subsection 3, the State of Colorado has acted to criminalize the exercise of fundamental rights of expression, freedom of speech, and freedom of the press * * * * to criminalize the exercise of fundamental rights of expression in traditional public forum properties, near medical facilities in the state. In doing so the General Assembly has acted in disregard of the First Amendment of the United States Constitution. * * * *

On our initial petition to this Court, this Court denied review. We sought review of the United States Supreme Court, which following its decision in Schenck versus Pro-Choice Network of Western New York, granted our petition, vacated the decision of the Court of Appeals, and remanded the case to the Court of Appeals for further consideration, in light of Schenck.

QUESTION: Mr. Henderson, excuse me for a moment. But there's several significant differences between this case and Schenck. Now, I assume you agree with that.

ANSWER: Yes, Your Honor, there are very significant differences.

QUESTION: And among those differences here, we're dealing with a statute or an ordinance as opposed to an injunctive action problem; isn't that correct?

ANSWER: That is correct, Your Honor. There's no question that there are differences. Those differences, however, do not

result in this statute being able to pass (inaudible) constitutional muster.

QUESTION: Well, those differences, though, don't they determine the standard which should be applied?

ANSWER: Indeed, Your Honor. The Court of Appeals, both initially and on remand, concluded that the statute was content neutral on that.

And because it concluded that the statute was content neutral, it analyzed the statute under the Supreme Court's traditional public forum analysis, concluding that because the statute was narrowly tailored and left open ample alternative channels of communication, that the statute passed Constitutional muster. And it reached that decision both in the first and in the latter review. When the court --

QUESTION: And you agree that was the proper test to use that ordinance?

ANSWER: Your Honor, we did not agree with the Court of Appeals, and sought review, as the Court knows, on the question of content based review. We do not believe the Court correctly got that issue.

QUESTION: Well, that isn't my question. My question was, do you agree that the Ward test is the proper test to be applied to these cases?

ANSWER: Yes. Given the Court (inaudible) decision, yes, Your Honor. That's correct.

* * * *

(18)

Supreme Court, U.S.
FILED
NOV 10 1999
OFFICE OF THE CLERK

No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, *et al.*
Petitioners,
vs.

THE STATE OF COLORADO, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Colorado

JOINT APPENDIX

KEN SALAZAR
Attorney General
MICHAEL E. MCLACHLIN
Solicitor General
FELICITY HANNAY
Deputy Attorney General
CAROL D. ANGEL
Senior Assistant Attorney General
Counsel of Record
Natural Resources and Environment Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203
(303) 866-5016

Attorneys for Respondents Ken Salazar and State of Colorado

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
JOEL H. THORNTON
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 609
Washington, DC 20007
(202) 337-2273

Attorneys for the Petitioners

(Additional counsel listed on inside cover)

PETITION FOR CERTIORARI FILED MAY 17, 1999
CERTIORARI GRANTED SEPTEMBER 28, 1999

315 pp

Additional Counsel

ROGER W. NOONAN
MAUREEN HERR JURAN
GORSUCH KIRGIS LLP
1515 Arapahoe Street
Suite 1000
Denver, CO 80202
(303) 376-5000

Attorneys for Respondent
City of Lakewood, Colorado

THOMAS P. MONAGHAN
NEW HOPE LIFE CENTER,
ACLJ–NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

Additional Attorneys for
Petitioners

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I. JEFFERSON COUNTY DISTRICT COURT No. 93 CV 1984 (For clarity and brevity, pursuant to Supreme Court Rule 26.5, formal matters, including computer docketing codes, have been omitted)

Date	Proceedings
10-01-93	COMP FOR DECLARATORY JUDGEMENT & INJUNCTIVE RELIEF
10-07-93	SUMM W SVC ON DAVID THOMAS ON 10-1-93
	SUMM W SVC ON CITY OF LAKEWOOD ON 10-1-93
	SUMM W SVC ON GALE NORTON ON 10-1-93
	SUMM W SVC ON ROY ROMER (STATE OF COLO) 10-1-93
	***
10-18-93	MOTN FOR ENLARGE TIME TO ANSWER FOR GALE NORTON & STATE OF COLORADO & ROY ROMER
10-19-93	ORD GRANT DEFT ENLARGE OF TIME TO 11-1-93–MCV
	***
10-22-93	ANSW OF DEFT CITY OF LAKEWOOD
11-01-93	ANSW OF DEFTS STATE OF COLO & GALE NORTON
	***
12-06-93	NOTC TO SET
	MOTN FOR PRELIMINARY INJUNCTION W REQUEST FOR ACCELERATION
	MISC APPLICATION FOR SPECIAL

ADMISSION

Date	Proceedings
	MOTN FOR LEAVE TO FILE MEMO IN EXCESS OF 10 PGS
12-13-93	NOTC OF HEARING
12-16-93	MISC JOINT UNOPPOSED MOTN FOR ENLARGEMENT OF TIME
	ORD APPRVING ENLARGEMENT OF TIME FOR 20 DAYS–GFP
	***
12-17-93	NOTC AMENDED NOTC OF HEARING
	***
01-10-94	MOTN JOINT MOTN TO FILE RESP BRIEF IN EXCESS OF 10 PAGES
01-11-94	ORD DENYING DEFS MOTN TO FILE RESP BRIEF IN EXCESS OF TEN PAGES--GFP
	***
02-11-94	ORD CASE MGMT ORD--GFP
03-01-94	MEMO IN SUPPT OF PRELIM INJUNCT MOTN & ON THE TRIAL OF THE MATTER
03-07-94	MOTN JOINT MOTN FOR SUMMARY JUDGMENT
	BREF IN SUPPORT OF JOINT MTN FOR SUMMARY JUDG
	MISC APPENDIX OF AFFI AND DISCOVERY RESPONSES IN SUPPORT OF DEFT'S JOINT MTN FOR SUMMARY JUDG

Date	Proceedings
03-21-94	RESP TO PLAS MEMO IN SUPPORT OF PRELIMINARY INJUNCTION
03-24-94	BREF PLA BRIEF IN SUPPT OF CROSS-MOTN FOR SUMM JUDG & IN OPPOSITION TO DEFS JOINT MOTN FOR SUMM JUDGMENT
03-24-94	MOTN PLA CROSS-MOTN FOR SUMM JUDGMENT
	***
03-30-94	RPT OF EXPERT WITNESS FOR PLAS, WM BROWN
	CERT RULE 16 DISCLOSURE CERT FOR ALL PLAINTIFFS
	***
04-01-94	AFFI OF MARIANNE LA FRANCE
	RPT EXPERT REPORT OF WARREN HERN
04-01-94	CERT PRETRIAL DISCLOSURE CERT OF DEFTS
04-04-94	REPL MEMO IN SUPORT OF PLAS MOTN FOR PRELIMINARY INJUNCTION & ON THE TRIAL OF THE MATTER
04-11-94	BREF DEFTS RESPONSE BREF TO CROSS MOTN FOR SUMMARY JUDGMENT
04-18-94	BREF REPLY BREF IN SUPPORT OF CROSS MOTN FOR SUMMARY JUDGMENT
04-22-94	ORD RE: DEFTS MOTN FOR SUMMARY JUDGMENT--GFP
05-26-94	NOTC CT OF APPEALS: NOTICE OF APPEAL
05-25-94	NOTC CT OF APPEALS: NOTICE OF FILING APPEAL

Date	Proceedings
06-02-94	DESG OF RECORD ON APPEAL
06-15-94	DESG OF ADDL PARTS OF THE RECORD ON APPEAL BY DEFTS GALE NORTON & STATE OF COLORADO

II. COURT OF APPEALS OF COLORADO, NO. 94CA0856 (For clarity and brevity, pursuant to Supreme Court Rule 26.5, formal matters, including computer docketing codes, have been omitted)

DATE	PROCEEDINGS
	***
05/23/1994	NOTICE OF APPEAL FILED
	***
5/26/1994	TRIAL CRT REGISTER OF ACTIONS RECEIVED
06/02/1994	ADVISORY COPY DESIGNATION OF RECORD RECEIVED
06/21/1994	ADVISORY COPY RECEIVED LTR FROM ATTY TO T/C CLERK RE: REG OF ACTIONS
08/09/1994	LOWER COURT RECORD RECEIVED 1 VOLUMES
	***
08/24/1994	LOWER COURT RECORD FILED 1 VOLUME
08/24/1994	NOTICE OF FILING RECORD ISSUED
	***
09/16/1994	JURISDICTIONAL SCREENING DUE 09/16/1994
	***

DATE	PROCEEDINGS
09/22/1994	SUPPLEMENTAL LOWER CRT RECORD RECEIVED 1 VOLUME (ORIGINALLY DESIGNATED).
09/30/1994	SUPPLEMENTAL LOWER CRT RECORD FILED 1 VOLUME (ORIGINALLY DESIGNATED).
09/30/1994	NOTICE OF FILING RECORD ISSUED SUPPL-1 VOL (ORIG DESIGN) OPEN BRF REMAINS DUE.
10/03/1994	OPENING BRIEF FILED
	***
10/27/1994	SUPPLEMENTAL LOWER CRT RECORD RECEIVED 1 VOLUME - ORIGINALLY DESIGNATED.
11/03/1994	SUPPLEMENTAL LOWER CRT RECORD FILED 1 VOLUME - ORIGINALLY DESIGNATED.
11/03/1994	NOTICE OF FILING RECORD ISSUED SUPPL-1 VOL (ORIG DESIGN) ANS BRFS REMAIN DUE.
11/04/1994	MOTION OR REQUEST AMICUS BRIEF FILED CITY OF BOULDER NOTED PM
11/04/1994	RESPONSE AMICUS BRIEF DUE 11/14/1994
11/04/1994	AMICUS BRIEF FILED CITY OF BOULDER - ACCEPTED PER ORDER OF 11/22/94

DATE	PROCEEDINGS
11/07/1994	MOTION OR REQUEST AMICUS BRIEF FILED PLANNED PARENTHOOD (COFS ON AMICUS BRF) - NTD CPC
11/07/1994	RESPONSE AMICUS BRIEF DUE 11/17/1994 (TO MTN BY PLANNED PARENTHOOD)
11/07/1994	AMICUS BRIEF FILED PLANNED PARENTHOOD - ACCEPTED PER ORD OF 11/22/94
11/07/1994	ANSWER BRIEF FILED JOINT WITH REPLY BRIEF DUE 11/24/1994
11/22/1994	ORDER AMICUS BRIEF GRANTED PLANNED PARENTHOOD - NOT TO PARTICIPATE IN ORALS
11/22/1994	ORDER AMICUS BRIEF GRANTED CITY OF BOULDER - NOT TO PARTICIPATE IN ORALS
11/23/1994	MOTION OR REQUEST ORAL ARGUMENT FILED
11/23/1994	REPLY BRIEF FILED
	***
03/17/1995	SUPPLEMENTAL AUTHORITIES/CITES FILED
03/27/1995	SUPPLEMENTAL AUTHORITIES/CITES FILED
03/27/1995	RESPONSE OTHER FILED TO SUPPLEMENTAL AUTHORITIES FILED BY APPELLEES
	***

DATE	PROCEEDINGS
05/12/1995	NOTICE ORAL ARGUMENT ISSUED 06/20/1995 RESET TO 9:00 A.M. PER TX DIV V
06/09/1995	SUPPLEMENTAL AUTHORITIES/CITES FILED
07/13/1995	OPINION AFFIRMED OPINION ANNOUNCED VACATED BY US SUPREME COURT 2/27/97-MANDATE RCLD
07/13/1995	MANDATE DUE 07/28/1995
07/25/1995	PETITION FOR REHEARING FILED
08/17/1995	MANDATE DUE 09/18/1995
08/17/1995	PETITION FOR REHEARING DENIED DIV V
09/18/1995	PET/WRIT OF CERT RECEIVED 95SC593
	***
02/26/1996	ADVISORY COPY PET/WRIT OF CERT DENIED 95SC593
03/20/1996	LOWER COURT RECORD RETURNED 2VOLS
	MANDATE ISSUED TO T/C WITH OPINION
02/27/1997	ADVISORY COPY PET/WRIT OF CERT GRANTED 95-1905 US SUPREME COURT
02/27/1997	OPINION WITHDRAWN 95-1905 U S SUP CT ORDER
03/03/1997	FURTHER PROCEEDINGS DUE 04/17/1997 SEE US SUPREME CT 2-27-97 PENDING

DATE	PROCEEDINGS
03/19/1997	MOTION OR REQUEST OTHER FILED RECALL MANDATE-SIGNED BY ALL ATTYS
03/21/1997	ORDER OTHER GRANTED RECALL MANDATE
03/21/1997	MANDATE RECALL OF MANDATE ISSUED SEE ORDER OF 3-21-97
3/21/1997	CASE CASE ASSIGNED 03/21/1997 DIV V-EGR ALS SIR (U S SUP CT ORDER 95-1905)
	***
03/31/1997	ADVISORY COPY OTHER RECEIVED NOTICE FROM THE US SUPREME COURT 95-1905
04/02/1997	LETTER MAILED TO US SUPREME COURT IN RESP TO LTR RECD 3-26-97
	***
04/24/1997	ORDER SUPPLEMENTAL BRIEF ISSUED SIMULTANEOUS BRIEFS 10 PGS DUE ALL PARTIES
04/24/1997	OTHER SUPPLEMENTAL BRIEF DUE 05/14/1997 10 PGS FROM ALL PARTIES-ROUTE TO ALS EGR SIR
05/14/1997	RESPONSE SUPPLEMENTAL BRIEF FILED TO DIV
05/14/1997	RESPONSE SUPPLEMENTAL BRIEF FILED TO DIV
05/14/1997	MOTION OR REQUEST AMICUS BRIEF FILED PLANNED PARENTHOOD & CENTER FOR REPRODUCTIVE LAW

DATE	PROCEEDINGS
05/14/1997	AMICUS BRIEF FILED PLANNED PARENTHOOD & CENTER FOR REPRODUCTIVE LAW
05/15/1997	MOTION OR REQUEST AMICUS BRIEF FILED CITY OF BOULDER-COPY TO DIVISION-TO EGR
05/15/1997	AMICUS BRIEF FILED CITY OF BOULDER-COPIES TO DIVISION
05/16/1997	ORDER AMICUS BRIEF GRANTED
6/03/1997	ORDER AMICUS BRIEF GRANTED CITY OF BOULDER
06/26/1997	OPINION AFFIRMED OPINION ANNOUNCED Published: Y P2nd Cite: ___ P.2d: ___ EGR ALS SIR CONCUR CONCUR
06/26/1997	MANDATE DUE
07/10/1997	PETITION FOR REHEARING filed
07/24/1997	MANDATE DUE 08/25/1997
07/24/1997	PETITION FOR REHEARING DENIED DIV V
09/29/97	MANDATE ISSUED
09/29/1997	LOWER COURT RECORD RETURNED 3 VOLS
10/02/1997	PET/WRIT OF CERT RECEIVED 97SC630
10/02/1997	MANDATE RECALL OF MANDATE ISSUED CERT LIST SHOWED THIS # AS A DIST. CT. INCORRECTLY
	***
02/16/1999	OPINION RECEIVED 97SC630

DATE	PROCEEDINGS
03/10/1999	MANDATE RECEIVED 97SC630
	***
03/25/1999	MANDATE ISSUED
	***

III. SUPREME COURT OF COLORADO, No. 95SC593
(For clarity and brevity, pursuant to Supreme Court Rule 26.5, formal matters, including computer docketing codes, have been omitted)

Date	Proceedings
1995	
Sept. 15	Petition for Writ of Certiorari filed. *Opposition DUE: 9/28/95.
	***
Sept. 25	Court of Appeals original flat file; briefs & 3 volumes of records filed.
Sept. 28	Brief in Opposition to Petition for Writ of Certiorari filed. *Reply DUE: 10/6/95.
Oct. 06	Reply Brief in Support of Petition for Writ of Certiorari filed.
Oct. 13	Supplemental Authority for Brief in Opposition to Petition for Writ of Certiorari filed.
Nov. 13	Second Supplemental Authority for Brief in Opposition to Petition for Writ of Certiorari filed.
Nov. 30	Submitted
1996	
Feb. 26	ORDER - Petn. for Writ of Cert. DENIED, EN BANC.
Feb. 26	Returned to C/A w/rr: Original Flat File and 3 Volumes of Record

Date	Proceedings
Feb. 26	CASE CLOSED.
Feb. 26	Receipt Returned

IV. SUPREME COURT OF COLORADO, No. 97SC630
(For clarity and brevity, pursuant to Supreme Court Rule 26.5, formal matters, including computer docketing codes have been omitted)

Date	Proceedings
1997	
Aug. 15	Petition for Writ of Certiorari filed. *Opposition DUE: 8/28/97
	***
Aug. 28	Brief in Opposition to Petition for Writ of Certiorari filed. *Reply DUE: 9/05/97
	***
Sept. 08	Reply Brief in Support of Petition for Writ of Certiorari filed.
Nov. 18	Submitted
1998	
Jan. 12	ORDER - Petn. for Writ of Cert. GRANTED, EN BANC. (See Flat File for issue.) *Opening Brief DUE
Jan. 28	Court of Appeals Original Flat file and 3 Volumes of Records filed.
Feb. 19	Opening Brief filed. *Answer Brief DUE: 3/24/98

Date	Proceedings
Mar. 24	Motion for Leave of Court to File Brief of Amici Cur. Planned Parenthood of the Rocky Mountains, Inc., The Center for Reproductive Law & Policy, Inc., and the City of Boulder, Colorado filed. (Brief tendered)
Mar. 24	Answer Brief filed. *Reply Brief DUE: 4/10/98
April 8	ORDER - Motion for Leave of Court to File Brief of Amici Curiae Planned Parenthood of the Rocky Mountains, Inc., The Center for Reporductive Law & Policy, Inc., and the City of Boulder, Colorado, GRANTED.
April 08	Brief of Amici Curiae Planned Parenthood of the Rocky Mountains, Inc., The Center for Reporductive Law & Policy, Inc., and the City of Boulder, Colorado, filed.
April 09	Reply Brief filed.
Apr. 15	Request for Oral Argument filed.
	***
Apr. 29	***
	*Reply to Amici DUE: 5/15/98
May 14	Petitioners' Reply to Brief Amici Curiae of Planned Parenthood of the Rocky Mountains, Inc., the Center for Reproductive Law & Policy, Inc., and the City of Boulder, Colorado filed.
	***
Aug. 10	Set for Oral Argument on Monday, October 19, 1998 @ 10:00 a.m. Overland High School.

Date	Proceedings
Aug. 17	CORRECTED ORDER Oral Argument Order had Incorrect date, Order on docket sheet is correct
	***
Oct. 06	Petitioners' Citation of Supplemental Authority filed.
Oct. 19	Orally Argued and Submitted. EN BANC.
Oct. 28	Respondent's Motion for Leave to provide Citations filed.
Nov. 09	ORDER - Respondents' Motion for Leave to Provide Citations GRANTED. (Oct. 09)
Nov. 09	CORRECTED ORDER - Respondent's Motion for Leave to Provide Citations GRANTED. (date on order was incorrect)
1999	
Feb. 16	Judgment affirmed, En Banc. Scott, J.
	***
Mar 10	MANDATE issued.
Mar 10	3 Volumes of Record and Original Flat File returned to COA w/rr.
	***
Mar 10	CASE CLOSED.
May 24	Received Letter From U.S. Supreme Court re: Filing of Petition of Certiorari on 5/17/99 - case number 98-1856. (filed.)
Aug. 19	Letter received from US Supreme Court requesting transmittal of record received.
Aug 19	Certified Copy of Court of Appeals Record received
Aug 23	Three Volumes of Record from Jeffco received.

Date	Proceedings
Aug. 23	Copies of Supreme Court record, Court of Appeals record (1 vol. each), and three volumes of original record from Jefferson District Court sent to U.S. Supreme Court per their request. w/rr
Sep 01	Mailed 1 original cassette of oral argument on Oct. 19, 1998 to US Supreme Court. per their request. w/rr
Sept. 07	Received return receipt for CO Supreme Court file, COA and District Court files.

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, COSTS AND ATTORNEYS FEES, AND ACCELERATION UNDER C.R.C.P. RULE 65

INTRODUCTION

1. This is a civil rights action, under state and federal law, challenging a newly-enacted Colorado statute which creates "speech-free bubble zones" around people using the public ways within 100 feet of any "health care facility." This action is brought by the above-named individuals to obtain a declaratory judgment that the challenged statute violates well-recognized rights, including the rights to freedom of speech, press, and assembly, the right to due process, and the right to equal protection of the law, which rights are secured by the first and fourteenth amendments of the United States Constitution and by art. II, §§ 3, 4, 10, and 25 of the Colorado State Constitution. Plaintiffs also seek preliminary and permanent injunctive relief to prevent the Defendants, and persons acting in concert with them, from enforcing the challenged statute in

a manner inconsistent with the constitutional rights of the plaintiffs.

VENUE AND JURISDICTION

2. For the relief that Plaintiffs seek, this Court is the appropriate court of general jurisdiction, according to the Colorado Constitution, Art. 6, § 9.

3. The District Court, Jefferson County, Colorado, is the appropriate venue for this action.

4. This action arises under the United States Constitution, particularly the First and Fourteenth Amendments, under Federal law, particularly 42 U.S.C.A. §§ 1983 and 1988. This case also arises under state law, particularly the Uniform Declaratory Judgments Act, C.R.S. § 13-51-101, et seq.

5. This Court has jurisdiction to hear and grant:

a. Plaintiffs' prayer for declaratory relief under C.R.S. § 13-51-101, et seq., the Uniform Declaratory Judgments Act;

b. Plaintiffs' prayer for relief on their substantive federal civil rights claims under Title 42 U.S.C. § 1983, which jurisdiction is concurrent with the federal courts;

c. Plaintiffs' prayer for injunctive relief under Rule 65 of the Colorado Rules of Civil Procedure; and,

d. Plaintiffs' prayer for an award of the costs of litigation, including a reasonable award of attorneys fees, pursuant to 42 U.S.C.A. § 1988.

PARTIES

6. Plaintiff Leila Jeanne Hill is a citizen of the United States and a resident of Colorado.

7. Plaintiff Audrey Himmelmann is a citizen of the United States and a resident of Colorado.

8. Plaintiff Everitt W. Simpson, Jr. is a citizen of the United States and a resident of Colorado.

9. Defendant David J. Thomas is sued in his official

capacity as District Attorney for the First Judicial District of the State of Colorado, within which are located both Jefferson County and the City of Lakewood. The District Attorney for the First Judicial District is the chief law enforcement of nicer thereof and is charged with the duty and responsibility of enforcing the criminal laws of the State of Colorado, by and through the prosecution of criminal charges alleging the violation of state laws.

10. Defendant City of Lakewood, Colorado, is a municipal corporation existing under the laws and Constitution of the State of Colorado and is a corporate entity capable of suing and being sued. The Defendant City maintains and operates the Lakewood Police Department, which police department would, in the first instance, be responsible for the detention, arrest, and referral for prosecution, of persons alleged to have violated laws and ordinances within the corporate limits of the City of Lakewood, Colorado.

11. Defendant Gale A. Norton is sued in her official capacity as Attorney General of the State of Colorado. The Attorney General of Colorado is the chief law enforcement officer for the State of Colorado.

12. Defendant State of Colorado is a sovereign governmental entity existing under the laws and Constitution of the United States and of the State of Colorado. It was the exercise of legislative power by the State of Colorado, in the enactment of new code § 18-9-122 of the Colorado Revised Statutes, which led to the filing of the instant action. Defendant State of Colorado is the governmental body responsible for the enforcement of state statutes.

ALLEGATIONS OF FACT

13. On April 19, 1993, the Honorable Roy Romer, Governor of the State of Colorado, signed into effect legislation

denominated House Bill 93-1209.

14. House Bill 93-1209 took effect, by its own terms, "upon passage." Said legislation created, inter alia, a new section of the Colorado Revised Statutes, § 18-9-122.

15. Section 18-9-122(3) provides as follows:

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

16. Each plaintiff opposes the performance of human abortion, which they understand to be the extermination of innocent human life.

17. Prior to the enactment of C.R.S. § 18-9-122(3), Plaintiffs Hill, Himmelmann and Simpson had engaged in "sidewalk counseling" on the public ways or sidewalks within 100 feet of the entrances of facilities where human abortion is practiced or where medical personnel refer women to other facilities for the commission of human abortions.

18. "Sidewalk counseling" consists of efforts to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature.

19. Prior to enactment of C.R. S. § 18-9-122, each plaintiff had publicly expressed that opposition to abortion, as well as the availability of humane alternatives to the termination of human beings by abortion, by engaging in sidewalk counselling and public protest on the public ways or sidewalks with 100

feet of the entrances of facilities where human abortions are committed. or where medical personnel refer women to other facilities for the commission of human abortions.

20. In the past, each plaintiff has engaged in leafletting, handbilling, displaying signs, or oral protesting, educating, or counseling with members of the body politic that pass within their vicinity while they were within 100 feet of the entrances of facilities where human abortion is committed or where medical personnel refer women to other facilities for the commission of human abortions.

21. The activities described in paragraphs 17 through 20 (hereafter, "said activities") frequently entail being within eight feet of other persons.

22. Each of the Plaintiffs plans, desires and wishes to continue engaging in said activities.

23. On July 2, 1993, Roger W. Noonan, Esq., City Attorney for the City of Lakewood, Colorado, corresponded with Plaintiff Everitt Simpson by letter.

24. By letter, City Attorney Noonan declared, "The Lakewood Police Department has been advised of the provisions of this new statute and is prepared to enforce its terms."

25. Furthermore, City Attorney Noonan stated in the July 2 letter to Plaintiff Simpson that "violations of this new statute will be instead prosecuted by the Office of the District Attorney, First Judicial District, 1726 Cole Boulevard, Building 22, Suite 300, Golden, Colorado, 80401."

26. Plaintiffs fear that engaging in said activities will subject them to arrest and criminal prosecution under § 18-9-122(3).

27. The fear of potential criminal prosecution under § 18-9-122(3) has caused plaintiffs to be chilled in the exercise of

fundamental constitutional rights.

28. The Lakewood Police Department of the City of Lakewood, Colorado, upon information and belief, is aware of the enactment of new section 18-9-122 and, upon information and belief, will enforce said provision through arrest and criminal process when Plaintiffs engage in their protected speech, press, and assembly activities.

29. Unless and until defendants are restrained by order of this Court, defendants or their agents or deputies intend to enforce § 18-9-122(3).

30. Unless and until this court restrains enforcement or declares § 18-9-122(3) unconstitutional, defendant State of Colorado will continue to enforce said new section.

ALLEGATIONS OF LAW

31. Each and all of the acts of the Defendants, their officers, agents and employees, as alleged herein, were done or are threatened to be done by the Defendants, not as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs, and uses of the State of Colorado.

32. Plaintiffs are suffering irreparable injury from the threat of criminal and civil enforcement of § 18-9-122(3).

33. Unless and until the threat of criminal and civil liability, which has arisen by reason of the enactment of § 18-9-122(1) is lifted, Plaintiffs will continue to suffer irreparable injury.

34. By operation of federal law, § 18-9-122(3) does not apply to labor activities.

35. By operation of Colorado law, § 18-9-122(3) does not apply to labor activities.

FIRST CAUSE OF ACTION
VIOLATION OF THE RIGHT TO FREEDOM
OF SPEECH UNDER THE CONSTITUTION
OF THE STATE OF COLORADO
(By All Plaintiffs)
(Against All Defendants)

36. Plaintiffs reallege paragraphs 1-35, supra, and incorporate them herein.

37. Section 18-9-122(1) restrains speech before its utterance.

38. Section 18-9-122(3) is an unconstitutional abridgement on its face, and as applied or threatened to be applied, of the Plaintiffs' affirmative rights to freedom of speech under the Colorado Constitution, Art. II, § 10, in that it imposes a prior restraint on constitutionally protected speech, including hand-to-hand distribution of literature, displays of signs, and/or oral protest, education and counseling, on public ways and sidewalks.

39. Such a system of prior restraints is unconstitutional because it lacks adequate procedural safeguards necessary to validate an otherwise unconstitutional statute, in that the statute does not impose a time deadline within which consent must be given and the statute provides absolutely no means by which decisions to deny consent are subjected to judicial review to determine the constitutionality of any decision to deny or revoke consent.

40. Section 18-9-122(3) imposes an impermissibly burdensome requirement that Plaintiffs receive permission from each and every person who passes within eight feet of them while they engage in the distribution of literature, the display of signs, or oral protest, education or counseling on the public ways and sidewalks within 100 feet of the entrances of the

abortion businesses where Plaintiffs conducted their free speech activities in the past, and where they plan to continue those activities in the fixture.

41. The public streets and sidewalks within 100 feet of the entrances to medical facilities are part of the traditional public forum, within which the right of the government to regulate speech is narrow and well-defined. Section 18-9-122(3) fails scrutiny as unjustifiably burdensome restriction on speech and press in the traditional public forum.

42. No compelling government interest exists to justify § 18-9-122(3). The provisions of § 18-9-122(3) are not the least restrictive means to accomplish any permissible government purpose sought to be served by the legislation.

43. New section 18-9-122 impermissibly elevates the heckler's veto from its constitutional status as a natural though regrettable attendant to the right to free expression, making such heckler's veto effectively the law with respect to the right to speak at a particular place and time.

44. Section 18-9-122(3) is a content-based restrictions on speech. The restriction on oral protest, education and counseling is an explicit requirement that the content of proposed speech be examined in advance of its occurrence and that the restrictions, if any, which the statutes imposes, flow from the conclusion that the speech constitutes oral protest, counseling and education. Furthermore, § 18-9-122(3) is a viewpoint-based restriction on speech because the statute, as written, makes it likely that prosecution will occur based on displeasure with the position taken by the speaker.

45. Section 18-9-122(3) is unconstitutionally overbroad restriction on expressive activity, on its face and as applied and construed, in violation of the right to free speech under the Colorado Constitution, Art. 2, § 10.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter in the prayer for relief.

SECOND CAUSE OF ACTION
VIOLATION OF THE RIGHT TO
FREEDOM OF THE PRESS UNDER
THE COLORADO CONSTITUTION
(By All Plaintiffs)
(Against All Defendants)

46. Plaintiffs reallege paragraphs 1-45, supra, and incorporate them herein.

47. The distribution of written materials is a classic example of the exercise of the right to freedom of the press.

48. No compelling government interest exists to justify the restrictions imposed on such an exercise of the freedom of the press in these circumstances. Nor is the restriction the least restrictive means available to serve any permissible government purpose intended to be served by the statute.

49. New section 18-9-122 imposes a svstem of prior restraints on the publication and/or circulation of printed materials. The system of prior restraints is an unconstitutional violation of the right to freedom of the press under the Colorado Constitution, Art. 2, § 10, because it lacks adequate procedural safeguards required in such circumstances and because it extends unbridled discretion to the decision-maker.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter in the prayer for relief.

THIRD CAUSE OF ACTION
VIOLATION OF THE DUE PROCESS CLAUSE OF
THE COLORADO CONSTITUTION
(By All Plaintiffs)

(Against All Defendants)

50. Plaintiffs reallege paragraphs 1-50, supra, and incorporate them herein.

51. Section 18-9-122(3) fails to adequately advise, notify or inform persons threatened with possible prosecution for its violation of its requirements.

52. Because § 18-9-122(3) fails to adequately advise persons subject to prosecution under it of the obligations it creates, it is unconstitutionally vague, on its face and as applied and construed, in violation of the due process clause of the Colorado Constitution, Art. 2, § 25.

53. Section 18-9-122(3) is an irrational and unreasonable statute, which imposes irrational and unjustifiable restrictions on the pristine exercise of protected constitutional rights. Because it is irrational and unreasonable, its application violates the due process clause of the Colorado Constitution, Art. 2, § 25.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter in the prayer for relief.

FOURTH CAUSE OF ACTION
VIOLATION OF THE IMPLIED EQUAL PROTECTION
CLAUSE OF THE COLORADO CONSTITUTION
(By All Plaintiffs)
(Against All Defendants)

54. Plaintiffs reallege paragraphs 1-53, supra, and incorporate them herein.

55. Section 18-9-122(3) violates the rights of Plaintiffs to enjoy equal protection of the laws, a right guaranteed implicitly by the Colorado Constitution, Art. II, § 25, in that the statute subjects the sidewalk counselling and other expressive activities of the Plaintiffs to burdens different from, and in

excess of, those imposed on persons engaged in labor-related picketing activities.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter in the prayer for relief.

FIFTH CAUSE OF ACTION
VIOLATION OF THE RIGHT TO FREEDOM OF SPEECH
UNDER THE UNITED STATES CONSTITUTION
(By All Plaintiffs)
(Against All Defendants)

56. Plaintiffs reallege paragraphs 1-55, supra, and incorporate them herein.

57. Section 18-9-122(3) restrains speech before its utterance.

58. Section 18-9-122(3) is an unconstitutional abridgement on its face, and as applied or threatened to be applied, of the Plaintiffs' affirmative rights to freedom of speech under the United States Constitution, amend. I and XIV, in that § 18-9-122(3) imposes a prior restraint on constitutionally protected speech, including hand-to-hand distribution of literature, displays of signs, and/or oral protest, education and counseling, on public ways and sidewalks.

59. Such a system of prior restraints is unconstitutional because it lacks adequate procedural safeguards necessary to validate an otherwise unconstitutional statute, in that the statute does not impose a time deadline within which consent must be given and the statute provides absolutely no means by which decisions to deny consent are subjected to judicial review to determine the constitutionality of any decision to deny or revoke consent.

60. Section 18-9-122(3) imposes an impermissibly burdensome requirement that Plaintiffs receive permission from

each and every person who passes within eight feet of them while they engage in the distribution of literature, the display of signs, or oral protest, education or counseling on the public ways and sidewalks within 100 feet of the entrances of the abortion businesses where Plaintiffs conducted their free speech activities in the past, and where they plan to continue those activities in the fixture.

61. The public streets and sidewalks within 100 feet of the entrances to medical facilities are part of the traditional public forum, within which the right of the government to regulate speech is narrow and well-defined. Section 18-9-122(3) is an irrational and unreasonable statute, which imposes irrational and unjustifiable restrictions on the pristine exercise of protected constitutional rights. No compelling government interest exists to justify the statute. The provisions of § 18-9-122(3) are not the least restrictive means to accomplish any permissible government purpose sought to be served by the legislation.

62. New section 18-9-122 impermissibly elevates the heckler's veto from its constitutional status as a natural though regrettable attendant to the right to free expression, making such heckler's veto effectively the law with respect to the right to speak at a particular place and time.

63. Section 18-9-122(3) is a content-based restriction on speech. The restriction on oral protest, education and counseling is an explicit requirement that the content of proposed speech be examined in advance of its occurrence and that the restrictions, if any, which the statutes imposes, flow from the conclusion that the speech constitutes oral protest, counseling and education. Furthermore, § 18-9-122(3) is a viewpoint-based restriction on speech; the statute, as written, makes it likely that prosecution will occur based on displeasure

with the position taken by the speaker.

64. Section 18-9-122(3) is unconstitutionally overbroad restriction on expressive activity, on its face and as applied and construed, in violation of the right to free speech under the United States Constitution, amend. I and XIV.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter in the prayer for relief.

SIXTH CAUSE OF ACTION
VIOLATION OF THE RIGHT TO
FREEDOM OF THE PRESS
UNDER THE UNITED STATES CONSTITUTION
(By All Plaintiffs)
(Against All Defendants)

65. Plaintiffs reallege paragraphs 1 -64, supra, and incorporate them herein.

66. The distribution of written materials is a classic example of the exercise of the right to freedom of the press.

67. No compelling government interest exists to justify the restrictions imposed on such an exercise of the freedom of the press in these circumstances. Nor is the restriction the least restrictive means available to serve any permissible government purpose intended to be served by the statute.

68. New section 18-9-122 imposes a system of prior restraints on the publication and/or circulation of printed materials. The system of prior restraints is unconstitutional under the United States Constitution, amend. I and XIV, because it lacks adequate procedural safeguards required in such circumstances and because it extends unbridled discretion to the decision-maker.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter

in the prayer for relief.

SEVENTH CAUSE OF ACTION
VIOLATION OF THE RIGHT TO PEACEABLE ASSEMBLY
UNDER THE UNITED STATES CONSTITUTION
(By All Plaintiffs)
(Against All Defendants)

69. Plaintiffs reallege paragraphs 1 -68, supra, and incorporate them herein.

70. The public streets and sidewalks in the City of Lakewood, Colorado, and in Jefferson County, Colorado, including those streets and sidewalks within 100 feet of the entrances to medical facilities, are traditional public forum properties.

71. Plaintiffs' displays of signs, distribution of literature, and oral protest, counseling and education, are efforts to effect change in the current policy of the United States with respect to the commission of human abortions.

72. The right to peaceable assembly includes and protects the right of Plaintiffs, as members of the body politic, to engage in peaceful advocacy in support of, or in opposition to, the policies of the governments of the United States and of Colorado.

73. Section 18-9-122(3) unconstitutionally chills and abridges, on its face and as applied and construed, the rights of the Plaintiffs to peaceably assemble, which right is guaranteed by the United States Constitution, amend. I and XIV.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter in the prayer for relief.

EIGHTH CAUSE OF ACTION
VIOLATION OF THE DUE PROCESS CLAUSE

OF THE CONSTITUTION OF THE UNITED STATES
(By All Plaintiffs)
(Against All Defendants)

74. Plaintiffs reallege paragraphs 1-73, supra, and incorporate them herein.

75. Section 18-9-122(3) fails to adequately advise, notify or inform persons threatened with possible prosecution for its violation of its requirements.

76. Because § 18-9-122(3) fails to adequately advise persons subject to prosecution under it of the obligations it creates, it is unconstitutionally vague, on its face and as applied and construed, in violation of the due process guarantee of the United States Constitution, U.S. Const. amend. XIV.

77. Section 18-9-122(3) is an irrational and unreasonable statute, which imposes irrational and unjustifiable restrictions on the pristine exercise of protected constitutional rights. Because it is irrational and unreasonable, its application violates the due process clause of the United States Constitution, amend. XIV.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter in the prayer for relief.

NINTH CAUSE OF ACTION
VIOLATION OF THE EQUAL PROTECTION CLAUSE
OF THE UNITED STATES CONSTITUTION
(By All Plaintiffs)
(Against All Defendants)

78. Plaintiffs reallege paragraphs 1-78, supra, and incorporate them herein.

79. Section 18-9-122(3) violates the rights of Plaintiffs to equal protection of the laws, a right guaranteed implicitly by the United States Constitution amend. XIV, in that the statute

subjects the sidewalk counselling and other expressive activities of the Plaintiffs to burdens different ftom, and in excess of, those imposed on persons engaged in labor-related picketing activities.

WHEREFORE Plaintiffs respectfully pray that the Court grant the declaratory and injunctive relief set forth hereinafter in the prayer for relief.

PRAYER FOR RELIEF

Wherefore Plaintiffs respectfully pray that the Court:

a. Declare that § 18-9-122(3) is unconstitutional on its face because it violates the rights to freedom of speech, press and assembly, and the rights to due process and equal protection, all guaranteed to the Plaintiffs under the Constitution of the United States;

b. Declare that § 18-9-122(3) is unconstitutional on its face because it violates the rights to freedom of speech, press and assembly, and the rights to due process and equal protection, all guaranteed to the Plaintiffs under the Colorado Constitution;

c. Declare that § 18-9-122(3) is unconstitutional as threatened to be applied to the activities of Plaintiffs, described in paragraphs 16-20 of the Verified Complaint, because it violates the Plaintiffs' rights to freedom of speech, press and assembly, and the Plaintiffs' rights to due process and equal protection, all guaranteed to the Plaintiffs under the Constitution of the United States;

d. Declare that § 18-9-122(3) is unconstitutional as threatened to be applied to the activities of Plaintiffs, described in paragraphs 16-20 of the Verified Complaint, because it violates the Plaintiffs' rights to freedom of speech, press and assembly, and the Plaintiffs' rights to due process and equal protection, all guaranteed to the Plaintiffs under the Colorado Constitution;

e. Enjoin the Defendants, their agents, servants, employees, and attorneys, and those in active concert with them, from enforcing the provisions of § 18-9-122(1) against the Plaintiffs for their participation in the activities described in paragraphs 16-20 of the Verified Complaint;

f. Grant to Plaintiffs an award of their costs of litigation, including reasonable attorney fees and expenses; and,

g. Grant such other and further relief as this Court deems just and proper.

ANSWER OF DEFENDANTS STATE OF COLORADO AND GALE A. NORTON

Defendants Gale A. Norton, in her official capacity as Attorney General for the State of Colorado, and the State of Colorado, Roy Romer, Governor ("State") hereby answer the Verified Complaint as follows:

INTRODUCTION

1. The State admits that Plaintiffs challenge the constitutionality of a state statute and seek declaratory and injunctive relief. The State denies the remaining allegations in paragraph 1 of the Verified Complaint.

VENUE AND JURISDICTION

2. The State admits the allegations in paragraph 2 of the Verified Complaint.

3. The State admits the allegations in paragraph 3 of the Verified Complaint.

4. The State admits the allegations in paragraph 4 of the Verified Complaint.

5. The State admits the allegations in paragraph 5 of the Verified Complaint.

PARTIES

6. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the Verified Complaint, and therefore denies the same.

7. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Verified Complaint, and therefore denies the same.

8. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Verified Complaint, and therefore denies the same.

9. The State admits that David J. Thomas is sued in his official capacity as District Attorney for the First Judicial District of the State of Colorado, within which are located the City of Lakewood and Jefferson County, and that the District Attorney has authority to prosecute criminal charges alleging violation of state laws. The State denies the remaining allegations in paragraph 9 of the Verified Complaint.

10. The State admits the allegations in paragraph 10 of the Verified Complaint.

11. The State admits that Gale A. Norton is sued in her official capacity as Attorney General of the State of Colorado, but denies the remaining allegations in paragraph 11 of the Verified Complaint. The State affirmatively states that the Attorney General is legal counsel and advisor for each department, division, board, bureau, and agency of state government other than the legislative branch.

12. The State admits that the State of Colorado is a sovereign governmental entity existing under the laws and Constitutions of the United States and of the State of Colorado. The State is without knowledge or information sufficient to form a belief as to the truth of the second sentence of paragraph 12 of the Verified Complaint, and therefore denies the same. The State denies the third sentence of paragraph 12 of the

Verified Complaint, and affirmatively states that district attorneys are authorized to prosecute criminal charges in district court alleging violations of state laws.

ALLEGATIONS OF FACT

13. The State admits the allegations in paragraph 13 of the Verified Complaint.

14. The State admits the allegations in paragraph 14 of the Verified Complaint.

15. The State admits the allegations in paragraph 15 of the Verified Complaint.

16. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 of the Verified Complaint, and therefore denies the same.

17. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 of the Verified Complaint, and therefore denies the same.

18. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 of the Verified Complaint, and therefore denies the same.

19. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 of the Verified Complaint, and therefore denies the same.

20. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 of the Verified Complaint, and therefore denies the same.

21. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in

paragraph 21 of the Verified Complaint, and therefore denies the same.

22. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the Verified Complaint, and therefore denies the same.

23. The State admits the allegations in paragraph 23 of the Verified Complaint.

24. The State admits the allegations in paragraph 24 of the Verified Complaint.

25. The State admits the allegations in paragraph 25 of the Verified Complaint.

26. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26 of the Verified Complaint, and therefore denies the same.

27. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27 of the Verified Complaint, and therefore denies the same. The State further denies that section 18-9-122(3), C.R.S. has any chilling effect on the exercise of fundamental constitutional rights.

28. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28 of the Verified Complaint, and therefore denies the same.

29. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29 of the Verified Complaint, and therefore denies the same.

30. The State denies the allegations in paragraph 30 of the Verified Complaint and affirmatively states that district at-

torneys are authorized to prosecute criminal charges in district court alleging violations of state laws.

ALLEGATIONS OF LAW

31. The State admits that it is acting under state law, but denies that it has taken any action or threatened any action against Plaintiffs.

32. The State denies the allegations in paragraph 32 of the Verified Complaint.

33. The State denies the allegations in paragraph 33 of the Verified Complaint.

34. The State denies the allegations in paragraph 34 of the Verified Complaint, and states that the allegations are so vague that the State is without knowledge or information sufficient to form a belief as to the truth of said allegations.

35. The State denies the allegations in paragraph 35 of the Verified Complaint, and states that the allegations are so vague that the State is without knowledge or information sufficient to form a belief as to the truth of said allegations.

FIRST CAUSE OF ACTION

36. In response to the reallegations contained in paragraph 36 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

37. The State denies the allegations in paragraph 37 of the Verified Complaint.

38. The State denies the allegations in paragraph 38 of the Verified Complaint.

39. The State admits that section 18-9-122(3) requires consent, under narrowly defined circumstance, from the person who is the target of speech, and sets no time deadline for that consent. The State denies the remaining allegations in paragraph 39 of the Verified Complaint, and affirmatively states that there is no constitutionally protected right to force

speech upon an unwilling listener. The State further affirmatively states that judicial review is available should a statute be enforced unconstitutionally.

40. The State denies the allegations in paragraph 40 of the Verified Complaint, and affirmatively states that section 18-9-122(3) is a reasonable time, place and manner regulation of expressive activity.

41. The State denies the allegations in paragraph 41 of the Verified Complaint, and affirmatively states that section 18-9-122(3) leaves open ample alternative means of communication for expressive activities.

42. The State denies the allegations in paragraph 42 of the Verified Complaint, and affirmatively states that section 18-9-122(3) is narrowly tailored to serve a significant government interest.

43. The State denies the allegations in paragraph 43 of the Verified Complaint, and affirmatively states that there is no constitutionally protected right to force speech upon an unwilling listener.

44. The State denies the allegations in paragraph 44 of the Verified Complaint, and affirmatively states that section 18-9-122(3) is content-neutral.

45. The State denies the allegations in paragraph 45 of the Verified Complaint, and affirmatively states that section 18-9-122(3) has not been applied to Plaintiffs to date.

SECOND CAUSE OF ACTION

46. In response to the reallegations contained in paragraph 46 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

47. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47 of the Verified Complaint, and therefore denies

the same.

48. The State denies the allegations in paragraph 48 of the Verified Complaint, and affirmatively states that section 18-9-122(3) is narrowly tailored to serve a significant government interest.

49. The state denies the allegations in paragraph 49 of the Verified Complaint, and affirmatively states that section 18-9-122(3) protects private individuals from having messages forced upon them against their wishes.

THIRD CAUSE OF ACTION

50. In response to the reallegations contained in paragraph 50 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

51. The State denies the allegations in paragraph 51 of the Verified Complaint.

52. The State denies the allegations in paragraph 52 of the Verified Complaint.

53. The State denies the allegations in paragraph 53 of the Verified Complaint.

FOURTH CAUSE OF ACTION

54. In response to the reallegations contained in paragraph 54 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

55. The State denies the allegations in paragraph 55 of the Verified Complaint as a matter of law, and further states that the allegations contained in that paragraph are so vague that the State lacks sufficient knowledge or information to form a belief as to the truth of the allegations.

FIFTH CAUSE OF ACTION

56. In response to the reallegations contained in paragraph 56 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

57. The State denies the allegations in paragraph 57 of the Verified Complaint.

58. The State denies the allegations in paragraph 58 of the Verified Complaint.

59. The State admits that section 18-9-122(3) requires consent, under narrowly defined circumstance, from the person who is the target of speech, and sets no time deadline for that consent. The State denies the remaining allegations in paragraph 59 of the Verified Complaint, and affirmatively states that there is no constitutionally protected right to force speech upon an unwilling listener. The State further affirmatively states that judicial review is available should a statute be enforced unconstitutionally.

60. The State denies the allegations in paragraph 50 of the Verified Complaint, and affirmatively states that section 18-9-122(3) is a reasonable time, place and manner regulation of expressive activity.

61. The State denies the allegations in paragraph 61 of the Verified Complaint, and affirmatively states that section 18-9-122(3) leaves open ample alternative means of communication for expressive activities, and is narrowly tailored to serve a significant government interest.

62. The State denies the allegations in paragraph 62 of the Verified Complaint, and affirmatively states that there is no constitutionally protected right to force speech upon an unwilling listener.

63. The State denies the allegations in paragraph 63 of the Verified Complaint, and affirmatively states that section 18-9-122(3) is content-neutral.

64. The State denies the allegations in paragraph 64 of the Verified Complaint, and affirmatively states that section 18-9-122(3) has not been applied to Plaintiffs to date.

SIXTH CAUSE OF ACTION

65. In response to the reallegations contained in paragraph 65 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

66. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66 of the Verified Complaint, and therefore denies the same.

67. The State denies the allegations in paragraph 67 of the Verified Complaint, and affirmatively states that section 18-9-122(3) is narrowly tailored to serve a significant government interest.

68. The State denies the allegations in paragraph 68 of the Verified Complaint, and affirmatively states that section 18-9-122(3) protects private individuals from having messages forced upon them against their wishes.

SEVENTH CAUSE OF ACTION

69. In response to the reallegations contained in paragraph 69 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

70. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70 of the Verified Complaint, and therefore denies the same.

71. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 71 of the Verified Complaint, and therefore denies the same.

72. The State admits that the people have the right peaceably to assemble, subject to reasonable time, place and manner regulations, and denies the remaining allegations in paragraph 72 of the Verified Complaint.

73. The State denies the allegations in paragraph 73 of the Verified Complaint.

EIGHTH CAUSE OF ACTION

74. In response to the reallegations contained in paragraph 74 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

75. The State denies the allegations in paragraph 75 of the Verified Complaint.

76. The State denies the allegations in paragraph 76 of the Verified Complaint.

77. The State denies the allegations in paragraph 77 of the Verified Complaint.

NINTH CAUSE OF ACTION

78. In response to the reallegations contained in paragraph 78 of the Verified Complaint, the State incorporates by reference its individual responses to the original allegations.

79. The State denies the allegations in paragraph 79 of the Verified Complaint as a matter of law, and further states that the allegations contained in that paragraph are so vague that the State lacks sufficient knowledge or information to form a belief as to the truth of the allegations.

WHEREFORE, for the reasons set forth above, Defendants Gale A. Norton, in her official capacity as Attorney General for the State of Colorado, and the State of Colorado, Roy Romer, Governor, respectfully request that the Court:

(1) Enter judgment in favor of the State;

(2) Award the State its costs and reasonable attorneys fees incurred in this matter; and

(3) Award the State such other relief as the Court deems just and proper.

ANSWER OF DEFENDANT CITY OF LAKEWOOD

Defendant, The City of Lakewood (Lakewood), by and through its attorneys, Gorsuch, Kirgis, Campbell, Walker and Grover, answers the verified Complaint as follows:

INTRODUCTION

1. Lakewood admits that the Plaintiffs are challenging the constitutionality of a state statute and are seeking declaratory and injunctive relief.

VENUE AND JURISDICTION

2. Lakewood admits that the Court has jurisdiction over the claims in this matter.

3. Lakewood admits the allegations contained in paragraph 3 of the verified Complaint.

4. Lakewood admits the allegations contained in paragraph 4 of the Verified Complaint.

5. Lakewood admits the allegations contained in paragraph 5 of the Verified Complaint.

PARTIES

6. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 6 of the Verified Complaint and therefore denies the same.

7. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 7 of the Verified Complaint and therefore denies the same.

8. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 8 of the Verified Complaint and therefore denies the same.

9. In response to the allegations contained in paragraph 9 of the Verified Complaint, Lakewood admits that David J. Thomas is the District Attorney for the First Judicial District within which is located the City of Lakewood and Jefferson County, and that the District Attorney has authority to

prosecute criminal charges alleging violations of state laws. Lakewood denies the remaining allegations contained in paragraph 9 of the Verified Complaint.

10. Lakewood admits the allegations contained in paragraph 10 of the Verified Complaint.

11. Lakewood admits the allegations contained in paragraph 11 of the Verified Complaint.

12. In response to the allegations contained in paragraph 12 of the Verified Complaint, Lakewood admits that the State of Colorado is a sovereign governmental entity existing under the laws and Constitutions of the United States and Colorado with authority to enforce state statutes. As to the remaining allegations contained in paragraph 12 of the Verified Complaint, Lakewood is without sufficient knowledge to admit or deny the claims and therefore denies the same.

ALLEGATIONS OF FACT

13. Lakewood admits the allegations contained in paragraph 13 of the Verified Complaint.

14. Lakewood admits the allegations contained in paragraph 14 of the Verified Complaint.

15. Lakewood admits the allegations contained in paragraph 15 of the Verified Complaint.

16. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 16 of the Verified Complaint and therefore denies the same.

17. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 17 of the Verified Complaint and therefore denies the same.

18. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 18 of the Verified Complaint and therefore denies the same.

19. Lakewood is without sufficient knowledge to admit

or deny the claims contained in paragraph 19 of the Verified Complaint and therefore denies the same.

20. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 20 of the Verified Complaint and therefore denies the same.

21. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 21 of the Verified Complaint and therefore denies the same.

22. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 22 of the Verified Complaint and therefore denies the same.

23. Lakewood admits the allegations contained in paragraph 23 of the Verified Complaint.

24. Lakewood admits the allegations contained in paragraph 24 of the Verified Complaint.

25. In response to the allegations contained in paragraph 25 of the Verified Complaint, Lakewood admits and corrects the statement made by City Attorney Noonan in correspondence dated July 2, 1993 addressed to Everitt W. Simpson: "Violations of this new statute will instead be prosecuted by the Office of the District Attorney, First Judicial District, 1726 Cole Boulevard, Building 22, Suite 300, Golden, Colorado 80401."

26. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 26 of the Verified Complaint and therefore denies the same.

27. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 27 of the Verified Complaint and therefore denies the same.

28. In response to the allegations contained in paragraph 28 of the Verified Complaint, Lakewood admits that the Lakewood Police Department is aware of the enactment of

new section 18-9-122, Colorado Revised Statutes, and will enforce its terms. Lakewood denies the remaining allegations contained in paragraph 28 of the Verified Complaint.

29. In response to the allegations contained in paragraph 29 of the Verified Complaint, Lakewood admits only that the Lakewood Police Department intends to enforce new section 18-9-122, Colorado Revised Statutes. Lakewood denies the remaining allegations contained in paragraph 29 of the Verified Complaint.

30. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 30 of the Verified Complaint and therefore denies the same.

ALLEGATIONS OF LAW

31. Lakewood admits the allegations contained in paragraph 31 of the Verified Complaint.

32. Lakewood denies the allegations contained in paragraph 32 of the Verified Complaint.

33. Lakewood denies the allegations contained in paragraph 33 of the Verified Complaint.

34. Lakewood is without sufficient knowledge or information to form a belief as to the truth of allegations contained in paragraph 34 of the Verified Complaint and therefore denies the same.

35. Lakewood is without sufficient knowledge or information to form a belief as to the truth of allegations contained in paragraph 35 of the Verified Complaint and therefore denies the same.

FIRST CAUSE OF ACTION

36. Lakewood incorporates, by this reference, its responses to paragraphs 1 through 35 of the Verified Complaint.

37. Lakewood denies the allegation set forth in

paragraph 37 of the Verified Complaint.

38. Lakewood denies the allegations set forth in paragraph 38 of the Verified Complaint.

39. Lakewood denies the allegation set forth in paragraph 39 of the Verified Complaint.

40. Lakewood denies the allegation set forth in paragraph 40 of the Verified Complaint.

41. Lakewood denies the allegations set forth in paragraph 41 of the Verified Complaint.

42. Lakewood denies the allegations set forth in paragraph 42 of the Verified Complaint.

43. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 43 of the Verified Complaint and therefore denies the same.

44. Lakewood denies the allegations set forth in paragraph 44 of the Verified Complaint.

45. Lakewood denies the allegations set forth in paragraph 45 of the Verified Complaint.

SECOND CAUSE OF ACTION

46. Lakewood incorporates, by this reference, its responses to paragraphs 1 through 45 of the Verified Complaint.

47. Lakewood is without sufficient knowledge or information to form a belief as to the truth of allegations contained in paragraph 47 of the Verified Complaint and therefore denies the same.

48. Lakewood denies the allegations set forth in paragraph 48 of the Verified Complaint.

49. Lakewood denies the allegations set forth in paragraph 49 of the Verified Complaint.

THIRD CAUSE OF ACTION

50. Lakewood incorporates, by this reference, its

responses to paragraphs 1 through 49 of the Verified Complaint.

51. Lakewood denies the allegations set forth in paragraph 51 of the Verified Complaint.

52. Lakewood denies the allegations set forth in paragraph 52 of the Verified Complaint.

53. Lakewood denies the allegations set forth in paragraph 53 of the Verified Complaint.

FOURTH CAUSE OF ACTION

54. Lakewood incorporates, by this reference, its responses to paragraphs 1 through 53 of the Verified Complaint.

55. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 55 of the Verified Complaint and therefore denies the same.

FIFTH CAUSE OF ACTION

56. Lakewood incorporates, by this reference, its responses to paragraphs 1 through 55 of the Verified Complaint.

57. Lakewood denies the allegations set forth in paragraph 57 of the Verified Complaint.

58. Lakewood denies the allegation set forth in paragraph 58 of the Verified Complaint.

59. Lakewood denies the allegations set forth in paragraph 59 of the Verified Complaint.

60. Lakewood denies the allegation set forth in paragraph 60 of the Verified Complaint.

61. Lakewood denies the allegations set forth in paragraph 61 of the Verified Complaint.

62. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 62 of the Verified Complaint and therefore denies the same.

63. Lakewood denies the allegations set forth in paragraph 63 of the Verified Complaint.

64. Lakewood denies the allegations set forth in paragraph 64 of the Verified Complaint.

SIXTH CAUSE OF ACTION

65. Lakewood incorporates, by this reference, its responses to paragraphs 1 through 64 of the Verified Complaint.

66. Lakewood is without sufficient knowledge or information to form a belief as to the truth of allegations contained in paragraph 66 of the Verified Complaint and therefore denies the same.

67. Lakewood denies the allegations set forth in paragraph 67 of the Verified Complaint.

68. Lakewood denies the allegations set forth in paragraph 68 of the Verified Complaint.

SEVENTH CAUSE OF ACTION

69. Lakewood incorporates, by this reference, its responses to paragraphs 1 through 68 of the Verified Complaint.

70. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 70 of the Verified Complaint and therefore denies the same.

71. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 71 of the Verified Complaint and therefore denies the same.

72. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 72 of the Verified Complaint and therefore denies the same.

73. Lakewood denies the allegations set forth in paragraph 73 of the Verified Complaint.

EIGHTH CAUSE OF ACTION

74. Lakewood incorporates, by this reference, its responses to paragraphs 1 through 73 of the Verified Complaint.

75. Lakewood denies the allegations set forth in paragraph 75 of the Verified Complaint.

76. Lakewood denies the allegations set forth in paragraph 76 of the Verified Complaint.

77. Lakewood denies the allegations set forth in paragraph 77 of the Verified Complaint.

NINTH CAUSE OF ACTION

78. Lakewood incorporates, by this reference, its responses to paragraphs 1 through 77 of the Verified Complaint.

79. Lakewood is without sufficient knowledge to admit or deny the claims contained in paragraph 79 of the Verified Complaint and therefore denies the same.

WHEREFORE, for the reasons set forth above, Defendant, the City of Lakewood, requests that the Court:

(1) Enter judgment in favor of Lakewood:

(2) Award Lakewood its costs and reasonable attorney fees incurred in this matters; and

(3) Award Lakewood such other and further relief as the Court deems just and proper.

MOTION FOR PRELIMINARY INJUNCTION WITH REQUEST FOR ACCELERATION PURSUANT TO CRCP 65

PLAINTIFFS, by the undersigned counsel, move the Court for a preliminary injunction, in the form annexed hereto as Appendix A, by said order enjoining the Defendants and those in concert with them from forcing or threatening to enforce

Colorado Revised Statute § 18-9-122(3) against Plaintiffs when, while within 100 feet of the entrances to medical facilities that perform or counsel for abortions, Plaintiffs engage in oral education, oral counseling, oral protest, and/or display of signs, and/or distribution of literature. In support of their motion, Plaintiffs have filed herewith Exhibits 1, 2, and 3, the Affidavits of Plaintiffs Hill, Himmelmann, and Simpson, respectively.

WHEREFORE Plaintiffs pray that the Court grant the instant motion, and Plaintiffs further pray that the Court accelerate the trial on the merits of this matter and set down the trial on the merits hearing together with the hearing on the motion for preliminary injunction.

AFFIDAVIT OF LEILA JEANNE HILL

Leila Jeanne Hill, being first duly sworn, deposes and states:

1. I am a plaintiff in the above-captioned matter, and I make this Affidavit upon my personal knowledge of the facts, and am competent to testify to the facts stated herein.

2. I am a citizen of the United States and a resident of Wheat Ridge, Jefferson County, Colorado.

3. By education and training I am a registered nurse, having graduated with a Bachelor of Science in nursing from the University of Northern Colorado in Greeley, Colorado, in 1972.

4. I oppose the performance of human abortion, because I understand human abortion to be the extermination of innocent human life.

5. I am aware that many women who abort do so because no one has offered them the opportunity to choose an alternative course of action which would preserve the lives of their children and themselves.

6. For eight years, I have engaged in an activity which I refer to as "sidewalk counseling" for the purpose of offering abortion-bound women alternatives to legalized human abortion.

7. Sidewalk counseling consists of efforts to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature. In sidewalk counseling, I engage in a variety of activities designed to impart information to abortion-bound women and their friends and families:

a. I prepare and/or select informative literature about abortion and its alternatives;

b. I distribute literature on public streets and sidewalks in the immediate vicinity of businesses where legalized human abortions are performed or where women are counseled and advised to obtain abortions;

c. I communicate information about abortion and alternatives to abortion by word of mouth;

d. I carry educational devices, such as a scientific reproduction of the unborn human child at ten weeks gestation, and display such devices to members of the public as part of the counseling and education process; and,

e. I prepare informational signs and posters, containing information about abortion and alternatives to abortion for display to the public and to abortion-bound women.

8. a. To assist other concerned persons in learning how to provide sidewalk counseling services, I have prepared a manual entitled, "Sidewalk Counseling Workbook."

b. Attached hereto as Addendum 1 is a true and correct photocopy of that manual.

c. On pages 2-3 of the Workbook, I discuss the idea of

success in sidewalk counseling. I view success in sidewalk counseling to include the saving of even one child from extermination by human abortion. see page 2 of the Workbook, as well as a number of other visible positive results, see page 3.

d. On pages 5-9 of the Workbook, I discuss guidelines for conduct of sidewalk counselors, as well as guidelines for the creation and use of posters.

e. On pages 19-25 of the Workbook, I discuss methods and approaches for dealing with abortion-bound women.

9. Attached hereto as Addendum 2 is a true and correct photocopy of the information card which I have given to abortion-bound women and other willing recipients.

10. Prior to the enactment of C.R.S. § 18-9-122(3), I had publicly expressed my opposition to human abortion, and I had engaged in public educational efforts to advise abortion-bound women of the availability of humane alternatives to the termination of human beings by abortion, and I had engaged in sidewalk counselling on the public ways or sidewalks within 100 feet of the entrances of facilities where human abortion is practiced or where medical personnel refer women to other facilities for the commission of human abortions, without fear that I could be silenced by members of the public who did not care to hear, see or receive my message.

11. Although I have engaged in these activities around the State of Colorado, I have given particular emphasis to the following present or past medical facilities: Planned Parenthood of the Rocky Mountains of Wheat Ridge, Colorado; Planned Parenthood of the Rocky Mountains of Arvada, Colorado; Planned Parenthood of the Rocky Mountains of Lakewood, Colorado; Planned Parenthood of the Rocky Mountains of Denver, Colorado; and, Lutheran Hospital in

Wheat Ridge, Colorado.

12. In the past, I have engaged in leafletting, handbilling, displaying signs, or oral protesting, educating, or counseling with members of the body politic that pass within their vicinity while they were within 100 feet of the entrances of facilities where human abortion is committed or where medical personnel refer women to other facilities for the commission of human abortions.

13. My sidewalk counseling and abortion protest activities have entailed being within eight feet of other persons. Often it is impossible to remain on the public sidewalk, stay at least eight feet away from another person and continue speaking, displaying signs or otherwise protesting or counseling.

14. In my many years of sidewalk counseling I have seen a number of abortion-bound women change their minds about aborting their unborn child as a result of my sidewalk counseling, and God's grace. I know that there are women today who are thankful that, in the past, sidewalk counseling was treated like the perfectly reasonable exercise of First Amendment rights that I consider it to be; I know this fact because I have seen them smiling into the faces of children that would have been aborted, but for sidewalk counseling.

15. I also know women who have aborted one or more of their children before birth. Many of these women still mourn the losses of children through abortions which they obtained in ignorance of the nature of the act, or in ignorance of the various forms of assistance which would have made it possible for them to give life to their children. A number of these women have expressed regret for the fact that, at the time and place that they entered an abortion business, there were no sidewalk counselors offering the sorts of information and assistance that I make available.

16. I have had to modify the means by which I attempt to communicate to the public about abortion as a consequence of the enactment of C.R.S. § 18-9-122(3). The changes in my communicative activities, forced on me by fear of prosecution under the new law, have made my counseling, education and protest efforts more difficult and less effective.

17. I do plan to continue my activities but I do not want to live under threat of prosecution resulting from the dissatisfaction of others with my message.

AFFIDAVIT OF AUDREY HIMMELMANN

Audrey Himmelman, being first duly sworn, deposes and states:

1. I am a plaintiff in the above-captioned matter, and I make this Affidavit upon my personal knowledge of the facts, and am competent to testify to the facts stated herein.

2. I am a citizen of the United States and a resident of Denver, Colorado.

3. I oppose the performance of human abortions, because I understand human abortion to be the extermination of innocent human life.

4. I am aware that women who abort their children frequently do so because no one has offered them the opportunity to choose an alternative course of action which would preserve the lives of their children and themselves.

5. For nearly seven years, I have engaged in protesting against human abortion and "sidewalk counseling" to offer abortion-bound women alternatives to legalized human abortion.

6. I have engaged in these activities at the Planned Parenthood of the Rocky Mountains of Denver, Colorado, at

the Planned Parenthood of the Rocky Mountains of Arvada, Colorado, at the Lutheran Hospital in Wheat Ridge, Colorado, at the Mayfair Women's Clinic in Aurora, Colorado, at the Boulder Abortion Clinic and the Boulder Women's Clinic, in Boulder, Colorado.

7. When protesting or sidewalk counseling, I attempt to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature. In sidewalk counseling, I engage in a variety of activities designed to impart information to abortion-bound women and their friends and families.

8. Prior to the enactment of C.R.S. § 18-9-122(3), I had publicly expressed my opposition to abortion through public protest and I had engaged in sidewalk counseling on the public ways or sidewalks within 100 feet of the entrances of facilities where human abortion is practiced or where medical personnel refer women to other facilities for the commission of human abortions, without fear that I could be silenced by members of the public who did not care to hear, see or receive my message.

9. In the past, I have engaged in leafletting, handbilling, displaying signs, or oral protesting, educating, or counseling with members of the body politic that pass within their vicinity while they were within 100 feet of the entrances of facilities where human abortion is committed or where medical personnel refer women to other facilities for the commission of human abortions.

10. I use a variety of posters to express my views about abortion to the public. Some of the signs are textual (e.g., "Stop Abortion"), otherwise are pictorial (e.g., photoposter of "Baby Choice," the victim of a saline abortion).

11. My sidewalk counseling and abortion protest activities

have entailed being within eight feet of other persons. Often it is impossible to remain on the public sidewalk, stay at least eight feet away from another person and continue speaking, displaying signs or otherwise protesting or counseling.

12. My conduct while sidewalk counseling and protesting against abortion has always been well within the requirements of Colorado law; I have never been arrested for, or charged with any offense because of my activities at abortion businesses. In fact, no police officer or law enforcement officer has approached me to warn or advise me that I was engaging in unlawful activity as a consequence of my involvement in pro-life activities.

13. I have been compelled to alter my sidewalk counseling and protest activities as a consequence of the enactment of C.R.S. § 18-9-122(3). The changes in my communicative activities have been forced on me by fear of prosecution under the new law.

14. I do plan to continue my activities but I do not want to live under threat of prosecution resulting from possible dissatisfaction of some people with my message.

AFFIDAVIT OF EVERITT W. SIMPSON, JR.

Everitt W. Simpson, Jr., being first duly sworn, deposes and states:

1. I am a plaintiff in the above-captioned matter, and I make this Affidavit upon my personal knowledge of the facts, and am competent to testify to the facts stated herein.

2. I am a citizen of the United States and a resident of Jefferson County, Colorado.

3. I oppose the performance of human abortion, because I understand human abortion to be the extermination of innocent

human life.

4. I am aware that women who abort their children frequently do so because no one has offered them the opportunity to choose an alternative course of action which would preserve the lives of their children and themselves.

5. For about 4 or 5 years, I have engaged in an activity which I refer to as "sidewalk counseling" for the purpose of offering abortion-bound women alternatives to legalized human abortion. I have engaged in these activities at Planned Parenthood of the Rocky Mountains of Wheat Ridge, Colorado, at Planned Parenthood of the Rocky Mountains of Lakewood, Colorado, at Planned Parenthood of the Rocky Mountains of Arvada, Colorado, at the Lutheran Medical Center in Wheat Ridge, Colorado.

6. Sidewalk counseling consists of efforts to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature. In sidewalk counseling, I engage in a variety of activities designed to impart information to abortion-bound women and their friends and families:

a. I prepare and/or select informative literature about abortion and its alternatives;

b. I distribute literature on public streets and sidewalks in the immediate vicinity of businesses where legalized human abortions are performed or where women are counseled and advised to obtain abortions;

c. I communicate information about abortion and alternatives to abortion by word of mouth; and,

d. I prepare informational signs and posters, containing information about abortion and alternatives to abortion for display to the public and to abortion-bound women.

7. Prior to the enactment of C.R.S. § 18-9-122(3), I had publicly expressed my opposition to legalized human abortion by engaging in public protests and I had engaged in sidewalk counseling on the public ways or sidewalks within 100 feet of the entrances of facilities where human abortion is practiced or where medical personnel refer women to other facilities for the commission of human abortions, without fear that I could be silenced by members of the public who did not care to hear, see or receive my message.

8. In the past, I have engaged in leafletting, handbilling, displaying signs, or oral protesting, educating, or counseling with members of the body politic who pass within eight of me while I am within 100 feet of the entrances of facilities where human abortion is committed or where medical personnel refer women to other facilities for the commission of human abortions.

9. Among the posters I carry are both textual posters (e.g., "Abortion Kills Children") and pictorial posters (e.g., photoposter of baby killed by saline abortion). In fact, for about the last year, I have been wearing a sandwich sign with the "Abortion Kills Children" sign behind me and the photoposter of the aborted baby in front of me.

10. Among the various kinds of literature which I distribute are an information card the size of a business card, a leaflet showing fetal development, and a brochure entitled, "Did You Know."

11. My sidewalk counseling and abortion protest activities have entailed being within eight feet of other persons. In my experience, it would be impossible to remain on the public sidewalk, stay at least eight feet away from another person and continue speaking, displaying signs or otherwise protesting or counseling.

12. I do not force literature on people. I am cautious about my conduct when I am protesting and sidewalk counseling. I have never been arrested in this activity since I first began. Indeed, I have never struck anyone or made offensive physical contact with anyone at a facility. Nor have I ever foisted literature off on someone.

13. Although some persons who are unhappy with our message have engaged in harassing physical activities (we have had eggs and coke bottles thrown at us, one of our number has had a sign torn up) and in harassing communicative activities (we have had people curse at us and use the expressive prominently displayed middle finger of the hand, and I have been threatened with physical injury by a man driving by in a car accompanied by a woman passenger), I have never responded in kind, and have never even been accused of doing so.

14. I have discontinued sidewalk counseling and protest activities within 100 feet of the entrances to abortion facilities as a consequence of the enactment of C.R.S. § 18-9-122(3). The changes in my communicative activities have been forced on me by fear of prosecution under the new law.

15. I do plan to continue my activities but I do not want to live under threat of prosecution resulting from possible dissatisfaction of some people with my message.

AFFIDAVIT [OF KATHY HAVENS]

I, Kathy Havens, do swear and depose as follows:

1. I am a legal assistant for the Colorado Attorney General's office.

2. I personally reviewed the archive tapes of the legislative debates on House Bill 1209-93. The typed transcripts of these

tapes are attached to this affidavit. The transcripts were typed by personnel at the Department of Law.

3. I compared the typed transcripts with the actual tapes and certify that these transcripts are true and correct reproductions of the contents of the tapes.

HOUSE BILL 1209 - 93 HEARINGS

CHAIR: Representative Benavidez. Representative De Gette.
DE GETTE: Here.
CHAIR: Representative Fleming.
FLEMING: Here.
CHAIR: Representative Friednash.
FRIEDNASH: Here.
CHAIR: Representative George.
GEORGE: Here.
CHAIR: Representative Kaufman.
KAUFMAN: Here.
CHAIR: Representative Keller.
NO AUDIBLE REPLY.
CHAIR: Representative Knox.
NO AUDIBLE REPLY.
CHAIR: Representative Kreutz.
KREUTZ: Here.
CHAIR: Representative Morrison.
MORRISON: Here.
CHAIR: Representative Rupert.
RUPERT: Here.
CHAIR: Representative Tucker.
TUCKER: Here.
CHAIR: Representative Adkins.

ADKINS Here.
CHAIR: Representative De Gette, would you like to give us an opening on House Bill 1209 and then, if you would, tell me which order you would like your witnesses, I would appreciate it.
DE GETTE: Thank you, Madam Chair, and good morning to the Committee. We did bring you donuts, as promised, so I hope you all got one. All Colorado women have the right to reproductive choice, and they exercise that right in a variety of different ways. Colorado women and all Coloradans also have the right to choose other health services which could save their lives, such as cancer screening and treatment, routine medical examinations and pap smears. Today, in Colorado, that right to health care, to unrestricted health care, is in jeopardy. Anti-abortion groups are picketing women's health clinics across the state and are trying to intimidate or physically block all people's entry into these clinics without regard to the reasons they are entering the clinics. These groups use tactics of harassment and intimidation that are almost inconceivable to people who have been raised to, uh, with good manners, and to respect other people's rights of privacy. They do things like come inches away from people's faces, spit at them, scream at them, thrust posters, placards, at them, even thrusting dead cats in their faces and other methods of intimidation. These protestors have tried to physically block people's ingress and egress from clinics to the point of throwing themselves in front of their automobiles. For any woman or man seeking health treatment, this is a traumatic experience in life. But for a woman who is making a very difficult decision about reproductive choice, it is a particularly traumatic experience, not only emotionally, but physically. This problem has been worsened in the last month by the public perceptions surrounding the recent U.S. Supreme

Court decision in the Bray case. In that case, the U.S. Supreme Court said that federal judges may not use the federal civil rights laws to prohibit picketing at abortion clinics. In that case, the U.S. Supreme Court made no comment and, in fact, said that states can, states and localities, can enact statutes and ordinances which will control protests around clinics. However, some of the anti-choice groups have taken the decision far beyond its narrow scope of the federal civil rights laws and have used it as a mandate to block people's access to health care clinics. As a response to some of the atrocities which have been occurring at health clinics, both Denver and Boulder have enacted ordinances which control protests around medical clinics. These ordinances have been in effect for some time and have been upheld and the Boulder ordinance in particular has been upheld in the U.S. District Court by Judge Zita Weinshienk. The bill that I am bringing to you today is modelled after the Denver and Boulder ordinances, and I would like to spend a few minutes talking to you

On page 1 of the Bill, going on to page 2, the first section recognizes that the General Assembly believes access to health care facilities is imperative for citizens of this state, that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counselling and treatment. It's important for the General Assembly to recognize that we'd have to have a balancing test because in order to control free speech, we have to make a time, place and manner restriction judgment as to the importance of a person's right to seek medical care versus a person's First Amendment right to state their position.

The second paragraph on page 2, lines 10 through 12, simply states that a person commits a Class 3 misdemeanor if that

person knowingly obstructs the place, hinders, impedes, or blocks another person's entry or exit from a healthcare facility.

The third paragraph enacts the approach that I've been calling the bubble approach. What it does, is, it sets up an eight-foot radius around anybody entering a healthcare facility. No person may enter that radius for purposes of First Amendment protests unless the person entering consents. Consents under the way the Bill was drafted can either be express oral consent or can simply be a gesture of reaching out to take a leaflet or a handbill. Once that consent is given, the protestor can come closer to the person. Again, if this subsection 3 is violated, the violator commits a Class 3 misdemeanor.

Finally, what the Bill does is it creates a civil remedy as well as criminal damages. In looking at enacting a bubble-type statute, Colorado is at the forefront in this kind of legislation. There has been legislation in other states. Some of that legislation has been even more stringent than the 8-foot bubble ordinance. In San Diego, for example, they require the protestors to be across the street from the clinic. In Washington, they have 10 to 15-foot buffer zones rather than the 8-foot buffer zone. In Florida, in the 17th Judicial District, there's a 25-foot buffer zone. And so, you can see, we've taken a very conservative approach to balancing the right of people to freely walk into and out of clinics with the right of people to protest. I could go on all morning about the necessity for this Bill and the real tragedies that have occurred, but I have a number of witnesses here, this morning, who can articulate it much more eloquently than I can, and so I, I just, unless there are questions at this time, I'd like to open it to testimony.

CHAIR: Thank you, Representative De Gette. I think we will skip the questions at this point because there are a number

of people who would like to testify, and we do go on so early this morning. who would you like to call first?
DE GETTE: Gary Jamieson.
CHAIR: All right. Gary Jamieson.
JAMIESON: Is this okay?
CHAIR: Um hum. Just state your name for the tape.
JAMIESON: Yes. My name is Gary Jamieson. I am the Associate Director and Controller for Planned Parenthood of the Rocky Mountains. It means that I am responsible for the activities that support the activities of Planned Parenthood, like the accounting department and the warehouse and our laboratory. One of my responsibilities includes clinic security. For the past few years, in addition to my day job, I have been giving Saturday mornings to go down and help escort at the Vine Street Clinic, so I have a little over 100 Saturdays under my belt in terms of just seeing what the protest is like, you know, up close and personal, oftentimes, too close. I'm here speaking on behalf of the 26 clinics in Colorado. We see about 60,000 patients for family planning services every year. Abortion patients are only about 7% of that number. There are thousands of patients affected every year by hostile anti-choice activities all around the state. It's not just a Denver issue. We have clinics all over that have stories to tell. In addition to the 60,000 family planning patients, we see 24,000 to 26,000 pregnancy tests every year. About 9,000 of those are positive pregnancy tests, and over 4,000 of those are referred to prenatal services. These are people that want to be pregnant and come to us to find out. We'll do 55,000 pap smears a year, help detect cervical cancer. In fact, it's the efforts of Planned Parenthood clinics and clinics like ours that have taken cervical cancer from being the number I killer of women to a much less serious illness, doing lots of good work in that area. The point

of House Bill 1209 is to give everybody a little space to come in, make their choices and then go on about their business. We need literal and emotional space so that we can come in, go about our business and just go on. This won't solve the problem. It is just gonna be a good first step. We want to balance rights and allow everyone to sort of conduct their business with a little dignity, so, on behalf of our patients, our 60,000 patients that come to our clinics every year, the 250 employees that work here, and friends and partners and husbands that come into the clinics with the patients, I urge your support for this Bill.
CHAIR: Thank you, Mr. Jamieson. Are there questions from the Committee? Representative George.
GEORGE: I just didn't hear your numbers. You said that you have 60,000 patients, and then you said a percent of those are abortion?
JAMIESON: 7%.
GEORGE: 7%. Thank you.
CHAIR: Are there further questions from the Committee? Thank you very much. Susan Parks.
PARKS: Good morning. I'm the Administrator for Mayfair Women's Center, a private doctor's office that offers medical services such as birth control, abortion services and counselling. Currently, there is no legislation in the City of Aurora protecting our facility from anti-abortion protestors engaging in the criminal obstruction and vandalism of our facility. We've experienced many problems with anti-abortion factions that state quote, unquote "rescues" in which they obstruct entrance into our building and harass patients if they try to enter. They've placed glue and metal devices in and on all of our front and back door locks, preventing us from entering our office. They have also caused thousands of dollars of dam-

age by pouring butyric acid into our lobby area. Butyric acid has a very foul smelling odor which causes nausea and a burning sensation to the eyes, and it lasts for months.

It is impossible to remove, and it necessitates removal and replacement of all floor areas that have been contaminated. As a result of this, the Health Department closed the building, which disrupts not only our business for the day, but the businesses of other tenants and health care providers in our building. So, as you can see, we need a bill that protects us from these antiabortionists' actions, so that our time and money can be spent helping our patients as intended and not on lengthy criminal proceedings that we are currently subjected to, so I strongly urge you to pass this Bill.

CHAIR: Thank you, Miss Parks. Are there questions from the Committee? Representative Kaufman.

KAUFMAN: Miss Parks.

PARKS: Yes.

KAUFMAN: What type of clinic is it again? Is it like a women's clinic?

PARKS: It's a women's clinic, yes. Full service, we offer birth control and we do abortion services as well.

KAUFMAN: When these people come in and pour acid on the floor, is that during business hours? Or do they break in? Or?

PARKS: They have done it. The few times that they've done it, it's not been during business hours. They've got into the building.

KAUFMAN: Inaudible.

PARKS: Yes.

KAUFMAN: Can I? Have they been prosecuted?

PARKS: No.

CHAIR: Miss Parks, there are laws so, under which they could be prosecuted. Is that not the case?

PARKS: If we caught them, yes.

CHAIR: Can you explain how you think that for that kind of an incident this Bill would help you?

PARKS: Well, it's mainly just to protect us from... I'm just telling you the problems that we have. I realize this bill won't necessarily solve <u>that</u> problem. More security will solve our problem in that area. But the Bill is very essential for that fact that, you know, when patients approach our clinic, that they are able to come without being harassed, and to protect us in that way. And it does address vandalism, so, in some way, we would have some kind of, something on the books, legislatively, that would protect us.

CHAIR: Thank you. Representative Kaufman.

KAUFMAN: Have you had patients that were coming to your clinic that were not there for an abortion?

PARKS: Oh, yes.

KAUFMAN: That have been harassed?

PARKS: Oh, yes.

KAUFMAN: Could you tell me how they've been harassed?

PARKS: They've been approached and, you know, yelled at and given literature and, you know, "Don't kill your baby." They come in here, "Well, we're just here for a pap smear," you know, so.

CHAIR: Thank you. Are there any other questions from the Committee? Thank you very much.

PARKS: Thank you.

DE GETTE: My next witness is Kay Czarnecki.

CZARNECKI: My name is Kay Czarnecki. I'm a nurse practitioner. I' ve worked with Planned Parenthood for many years. During the last year I've been the manager of the clinic in Colorado Springs that offers varied services, including abortion. Having observed protestors at the Vine Street Clinic

and been involved in that, and, also at my own clinic, I am of the opinion that protestors are not there at all to help women or to save lives, but, rather, to make a bad situation even worse. I don't know what the motives are for intruding into a private situation like they do. The reasons that women choose abortion are many and very tragic. They ordinarily come to the clinic with the support of family and friends who truly care about them and are aware of the circumstances. How dare protestors that don't have any idea of what was behind this decision intrude into this private situation. We do warn people that there may be protestors, to drive past to come into the parking lots. Protestors are not allowed on the parking lot, but, unless there's someone there watching them, they do come on and know full well that they shouldn't be. They hand out brochures and yell, thrust signs in faces and generally try to upset the patient as much as possible, which makes it much more difficult for us to provide care in a scary situation anyway. We do offer varied services. Not everybody that's coming into the clinic is coming for an abortion. They have no way of knowing that. People often won't come on the days that they know we are doing abortions just to get supplies because they don't want to be subjected to that. And you can't hardly blame them. People coming with patients who are presumed to be involved in a personal way, such as perhaps being the mother of the patient, perhaps being the boyfriend or the husband of the patient, are also harassed in very hurtful way. Women are often told that they're giving up the joys of being a grandparent by accompanying someone to the clinic or that they're giving up their fatherhood by coming with someone. These people may not be involved in that way at all. It's very unfair for them to have to be subjected to that. It's a natural thing for people coming into a parking lot, even though we've said, "Don't stop.

Just drive through," to stop if there's somebody waiting there, in the driveway, obviously trying to give them information or to help them out. They don't know that they should just drive by and not pay any attention. They tend to stop, roll down their window, and then they get these things thrust into their cars or in their hands. People will follow along the sidewalk to get as close to their cars as they can so that they continue yelling at them clear up until they get into the clinic. We've had to place security doors where there's double locks. People have to be rung in each of the doors. We have magnetic locks that slide, because we've had our locks glued shut. We've had bicycle locks placed over handles, so that we've had to remove some of the handles from the doors. These things all lead to tremendous expense. They don't stop, though. When people are leaving the clinic, they're often stopped as they are driving out and, again, harassed about this decision. I'll give you a few instances. There was one patient who was very upset anyway. As she was leaving, she was stopped as she was driving out. A clinic member went out and asked if she would like to come back into the clinic for a while. She chose to drive on by herself. One of the protestors got in his vehicle and followed her for a few blocks. She called us then when she got home to tell us she'd arrived safely. There was another patient who chose to meet her ride up the block so that the person driving didn't have to come into the parking lot. We noticed that she was being followed by one of the protestors, so one of the staff members went out with her and stood on the corner and waited for her ride to come to keep the protestor away from her. I hadn't been working at that clinic more than two weeks, when a protestor came up and told me she knew where I had come from. I don't live in Colorado Springs, I live in another city. She'd obviously traced my license plate. This is an attempt at

intimidation. Patients are also intimidated by seeing their license plates being written down. I guess in conclusion, I would just like to say. Oh, I would like to say one other thing. There is an organization in Manitou Springs who evidently run youth camps during the summer. During midweek, we have bus loads of young people brought to our clinic with signs in the afternoon, marching up and down the sidewalks in front of our clinic. These are days that we don't even do abort ions. These are very young people, early teens. So what are they being taught? What kind of cancer is that? I'd just like to say I'd like ta see this bill passed. The further away we can keep people from out. patients, from intruding into these very private situations, the better off we're all going to be.

CHAIR: Thank you Ms. Czarnecki. Are there questions from the Committee? Representative Morrison.

MORRISON: Could you, uh, I noticed you don't have any notes with you, but perhaps you know the numbers off the top of your head. Again, what are the numbers of people who are going into the clinic in Colorado Springs who are not going for abortions? Do you have those numbers? Who are going for other kinds of treatment?

CZARNECKI: I'd like to ask Gary Jamieson to answer this (inaudible) you up.

MORRISON: Well, maybe he can follow that up. I don't want to take any more time. I just want to make it clear. I just want to clearly understand that a large percentage of your women who are visiting the clinics in Colorado Springs are certainly going for other services. Is that correct?

CZARNECKI: Oh, yes. Yes indeed. We are open six days a week. We provide abortion services on two of those days. The other days, and part of those days are also, are devoted to

other services, contraceptive services, mid-life program and (inaudible) services, yes.

CHAIR: Thank you. Are there any other questions from the Committee? Thank you, Miss Czarnecki.

HOPFENBECK: I'm Marie Hopfenbeck. I'm a board member with Rocky Mountain Planned Parenthood. I am also an escort at the Vine Street Clinic at Vine and 20th. I work there Wednesday mornings from 7:30 until 9:00, and I have done this for three years. I'm also a registered Republican. I would like to give you some sense of what happens during the clinic hours when the patients arrive for our services. The Vine Street Clinic is an abortion clinic. We, as escorts, our job is to get the patients into the clinic as quickly as possible. The protestors are on the sidewalk. There are anywhere from 6 to 15 and sometimes more on the Wednesdays when I work. We at the Vine Street Clinic are very fortunate because we have a physical situation which makes things a little better for us. We have a low wall that divides the sidewalk where protestors are walking up and down, divides the parking lot from the sidewalk. When the patients come into the parking area, we direct them to come up to the front door where the escorts encourage the patients to get out and come in immediately, and then, we, whoever is accompanying the patient, we help him or her to come into the clinic when the car is parked. All during this process, the protestors are yelling and screaming. They are flashing their bloody fetus signs. They are yelling, "You are killing a baby." They are yelling at us that we are guards from Dachau, and in my case, an old guard from Dachau. They are talking about fetuses and babies being dismembered, arms and legs torn off. They are saying that someone died in the clinic the day before. They are picking up on characteristics of the patients. They are talk, a young black woman came for services

yesterday. They called her "Mammy." They spoke in a dialect that they thought was appropriate. We, because we are in Denver, we do have the benefit of the "bubble" ordinance. And in some instances it has been of great help to us. I'd like to tell you two incidences which affected me. One was I was asked to move a car that had been parked on the street, and move it into the parking lot. What happens is, when the patients call to make their appointments, they are told by the clinic people to please drive into the parking lot and park their car and they will be escorted in by escorts. Not everybody hears everything when they are going through a situation like this, when they're dealing with some major decisions in their lives. So, some do not follow the instructions, and in this case, the instructions were not followed. The patient and her friend had gone into the clinic and, for security reasons, they were told that maybe they should move their car and bring it into the parking lot. They did not want to do this, so I and another escort went out to get the car. We were immediately surrounded, placards thrown in our faces. We were yelled and screamed at. I was told that. I' d murdered my own children. We got into the truck. It was difficult to maneuver. We creeped along. They were all over us, and I did speak out and say, "Get back. You must get back eight feet." And they did. At least it created a zone of safety. On another occasion, again, a mother and her daughter had not heard the instructions from the clinic, arrived at the gate which leads directly up to the door of the clinic. They had parked, too, on the street. They got to the gate. Unfortunately, the gate often sticks. They were immediately surrounded and yelled at and screamed at, and I told you some of the things they say. The young woman was in tears. We got the gate opened, spoke to the protestors, asked them to move back, they did. We got her, wrapped her up and got her into the clinic and into the door

- there are two doors, safety doors. The mother looked at me and said, "I can't believe this happens in this country." She said, "My daughter was raped." I came out and on that same day, one of the escorts was there just for training. It was her first day. She's a very strong woman, very active in this community, and I looked over at her, and she was against the wall sobbing. These are just some of the things that happen, and I strongly encourage the passage of Diana's, of Representative De Gette's bill, House Bill 1209, relating to clinic access.

CHAIR: Thank you, Miss Hopfenbeck. Representative Friednash.

FRIEDNASH: Thank you, ma'am. Could you explain to us or give us an example of what happened prior to the Denver ordinance?

HOPFENBECK: Prior to the Denver ordinance, we had no recourse. I mean, say, for example, when the young woman and her mother arrived at the gate, there would be no way for us to get them to move back without physical contact. They, they taunt us. They tease us. We try very hard to pretend that they are not there. We totally ignore them. We do not try to stimulate their verbal assaults. It's bad enough as it is. As f say, it does help to create a little area of safety around those seeking services. And the verbal assault, come down sometime. The verbal assault is unbelievable. They're. They're trying to get you to react. They're trying, they're attacking verbally those who are bringing the patient to the clinic, whether it's a husband or a boyfriend or a mother or a friend. When it's a man, they'll say, "What kind of a man are you? You are nothing. You are no man. You are murdering a child."

CHAIR: Are there other questions? Representative Benavidez. BENAVIDEZ: Thank you, Madam Chairman. Has there been an incident since the Denver ordinance where the clinic has had to call law enforcement to enforce the ordinance with the individuals or protestors there?

HOPFENBECK: Well, in the incident of the truck, when I was driving the truck. They first backed off in the first instance. Then I had to park. I didn't really go through the whole story, but, as I, the truck was really something else. I couldn't get the truck enough momentum to get up the ramp into the parking lot, and so I had to park just south of the driveway and then they surrounded us again and we couldn't get out of the car because the doors didn't work from the inside which we didn't realize. We couldn't get out. So, we were kind of trapped there, with all of them right against us, and they would say, we' d say, "You must get back," and they' d say, "You don't know what eight feet is. You have no idea." Well, finally, the clinic people were alerted and they came out and opened the doors from the outside and let us out, and we did file a complaint at that time. The police did come, but nothing happened. That was really right after the ordinance took, was in effect.

CHAIR: Thank you.

HOPFENBECK: Now, Gary Jamieson may be able to answer that other incident when a complaint was filed.

CHAIR: Are there further questions from the Committee? Thank you Miss Hopfenbeck. Representative De Gette, I have not yet received an answer on whether we are going to have to go on the floor at 8:30 and to make sure that the opponents of the Bill do have an opportunity, I' m going to switch now, at the present time and call some individuals who are are listed against the Bill. I do not believe we are going to get through everyone this morning, and unless we can get an extension this

morning, we will have to continue this hearing. Philip, is it Faustin? Would you please state your name for the tape and proceed.

FAUSTIN: My name is Philip Faustin. I represent Operation Rescue Colorado. I'd like to make myself available for questions after I make a couple comments. It seems to me what this Bill is really talking about is not being dealt with. A lot of the things that have been said so far seem to be things that are trying to create a hysteria that there's all these poor women who are being. The image that is being given is that you cannot walk into one of these places without someone right in your face. That's just not true. That probably happens on occasion, but as far as being the norm, it wouldn't be. The talk of healthcare facilities and all these other people going in for all these other reasons. In some of the places where there's a broad range of health services offered; some places, it's just abortions. But we're not talking about women going in for cancer - screening or pap smears. That's not why prolifers are outside of these places. And it's not those people whom they're trying to speak to. I also noticed in the beginning of the Bill it's talking about a person's right to obtain medical counselling and treatment in an unobstructed manner. Well, that is why we are there. We are trying to give correct medical information, information that is being denied inside of those places and, as a matter of fact, at Planned Parenthood in Denver, at the Vine Street Clinic. We have approached them through their director, Sylvia Clark, trying to work an agreement where we could provide correct medical information. We're not talking about biased pro-life information but scientific, factual information concerning the development of that child that is within the woman. We've been denied that opportunity. So we're not there just to harass people. Does harassment happen some-

times? Sure, it does. There's people that do not behave as they should. But that's the exception, rather than the rule. That is not why people are there. The majority of prolife people are there to provide information or to just be a conscience, to stand there and say, "This is not right," or to say, "There are alternatives. You do not have to do this." A couple things about the Bill, also. It's interesting that, you know, there's a multitude of other groups that do these same type activities, from animal rights protestors, anti-logging, Rocky Flats protestors, AIDS activists, who might block a person's access to a place or impede their access to a facility. Well, those people are not being targeted. Healthcare facilities is really a euphemism here. We're talking about the legislature being prodded to protect the abortion industry to legislate uninformed women. And that's what's being talked about in Section 3. We're not talking about someone that's denied access to the place. You cannot pass a leaflet to them. Show a sign. And it specifically talks in here about being on the public sidewalk. Now, I'm sure that there are some legislators who, if they could get away with it, would say pro-lifers are not allowed anywhere near this place, but that's pushing it a little bit too far, so, what is going on in Section 3 is the chipping away of First Amendment rights. When you can't speak or even hold a sign to someone unless they give consent, which, of course, appears to be a question, what does that mean -- consent--, and I don't think the definition given in the beginning was really accurate as far as expressed or reaching out for a handbill. How, would, what would that really mean unless someone gives consent. So, what we're talking about chipping away at First Amendment rights. You can't give someone a handbill. And all this hysteria that's being created, of this image of pro-life people shoving something in someone's face or screaming in their face,

spitting on them, holding dead cats, that's just all hysteria to try to create an environment of why do we have to do this. But, again, I bring up all the other groups that are not being targeted, the singling out of pro-life people because we are politically incorrect. So, let's take away these people's rights, not let them stand in front of a place. Now, what Susan Parks from Mayfair was talking about well, before, we have no way to deal with these things. There's no law in Aurora protecting them from vandalism or trespass. There again, I mean, there's something you can analyze and see, words said to create that hysteria. There's plenty of laws dealing with this. If someone vandalizes. There's laws against that. If someone trespasses, there's laws against that. If someone is harassed, there are preexisting laws against that. But what this Bill is attempting to do is say, "You cannot stand in front of one of these places on the public sidewalk and try to educate someone," and if we're talking about harassment, there's laws for that if someone is harassed, and then going into the civil remedies. You hold your sign and someone is walking down the sidewalk, just passing by the place within that eight-foot range, and they see your sign, they could go and file a civil lawsuit against you and say, "You showed me your sign," or someone driving by in a car sees your sign and says, "Oh, that offended me." So what are we talking about? You're trying to scare pro-lifers from exercising their First Amendment rights from in front of these places, so I urge you not to pass this bill.

CHAIR: Thank you. Mr. Faustin, can you answer a question for me. In terms of someone who is involved in these kinds of protest, how do you tell the difference between a woman who is entering one of these clinics for a normal health check and someone who is entering one of these clinics for an abortion? What's the deciding factor?

FAUSTIN: Well, sometimes, you don't know that, and, I mean there's plenty of times that picketing is going on and nothing is said at all. And there are people who, everyone who walks in a place, they'd say, "Don't kill your baby," and, myself, I would think that's not appropriate because I think you should, use intelligent speaking, if you don't know that's what she's doing, then why say that, why throw that out to everyone. But the fact is if someone is across the parking lot and walking into a place, and you're on the sidewalk or somewhere else yelling at her, she's beyond that eight foot anyway, so this bill has nothing to do about. We're talking about a specific of. You're up there blocking her from going through the door or you're out on the sidewalk and she's walking down the sidewalk or walking past you or something like that. So the generality of what they're there for really doesn't apply, and this Bill, in many cases, wouldn't have anything to do with that.

CHAIR: Thank you. Questions? Representative George.

GEORGE: I believe your comment was if this Bill would prevent people from, I think your words were exactly, "not allowed to stand in a place." Would you point out to me where in the Bill that it would prevent your people from standing in a place?

FAUSTIN: Well, what if I said those exact words, they're not clear as to what I meant. What I would mean by that is it's trying to scare people away from standing in front of these places because just by standing there, you're out on the public sidewalk which used to be a place where you could just be and protest. You know, we're not talking about trespassing or blocking or anything like that. We're talking about what was at one time a completely legal activity. Well, according to this Bill, it's a very chilling thing. If you're just standing there and someone is walking by you and offended by your sign, you can

be found criminally liable, according to this and then, even if you're not found criminally liable, they can file a civil suit against you and say, "I was offended by your sign," and, according to this, they could get damages. So, in essence, that would prevent people from standing in front of a place.

CHAIR: Representative George and then Representative Friednash.

GEORGE: Please show me where in the Bill it shows that being offended by a sign creates a basis for a crime.

FAUSTIN: Well, in Section 3, it says if you display a sign, Section 3, lines 15 and 16, page 2. It says, "You shall not approach another person within eight feet unless they consent for the purpose of passing a leaflet, displaying a sign, engaging in oral protest, education or counselling, and on it goes. So, just holding a sign to someone within that range - we're not talking about shoving it in their face or hitting them with that - just by holding that sign, if someone is offended by that sign, you're guilty of violating that section.

CHAIR: Representative George.

GEORGE: Do you agree that that section means holding the sign within the eight feet?

FAUSTIN: Right.

GEORGE: So, it's the eight feet that bothers you?

FAUSTIN: Right.

GEORGE: Thank you.

CHAIR: Representative Friednash, and then Representative Rupert.

FRIEDNASH: Thank you, Madam Chair. Personally, I'd like to see restriction in subsection 3 be 100 feet wide, but I don't think that's constitutional. In my view, I think this Bill strikes a delicate balance between the First Amendment and access to healthcare, and I think two arms' lengths away is

pretty reasonable time, place and manner restriction, and I wanted to get your comments on that because you can still as Representative George was alluding to, you could still stand eight feet away and hold your sign and have your information available. I don't think that restricts your ability to, as you say, give out correct medical information or educate or hold up your sign. I just don't believe the constitutional, First Amendment right is absolute to do that.

FAUSTIN: Would you introduce a bill doing the same thing for animal rights protestors?

FRIEDNASH: That's irrelevant.

FAUSTIN: Right. Because you're coming from your bias, so that's how you view this. But me coming from the other side, yes, it's very much an infringement upon my First Amendment rights because I cannot be free on that sidewalk to pass out literature to someone or to hold my sign or to try to speak to them, so that's definitely an infringement on my First Amendment rights, and it is far beyond a delicate balance.

CHAIR: Representative Friednash.

FRIEDNASH: One further question, thank you, Madam Chair. I read Section 18-9-111, harassment crime in the State of Colorado. Can you explain to me how harassment can be criminally prosecuted under this statute already?

FAUSTIN: Well, I'm not a lawyer, so I am not completely familiar with what all happens in those types of situations, but there are laws against harassment. If you are harassing someone, continually pestering them, they can file a complaint against you. what I think this Bill is really designed to do is to almost invite people to file civil lawsuits, to take it beyond someone who is genuinely harassed and put it in the area, "Well, he held his sign, and I didn't like what it said or what the picture was, so, therefore, I can file," where something like that,

just holding a sign as someone passes by would not be prosecuted as harassment, as I would understand it, but under this, it would be.

CHAIR: Representative Rupert and then Representative Morris.

RUPERT: Thank you, Madam Chair. Sir, I have a question about your definition of hysteria, and my response, my bodily response in the last two or three days to the phone calls I've been getting, thank goodness, none from my constituents. But, I want to tell you, sir, I have no reason to feel, I'm not going to be entering any clinic, and I know, you know, what my feelings are on this Bill, but when I get phone calls like that, and I think about, then, if I were to have to walk into a clinic, now, after being addressed the way I was - you use the words "politically correct" - I'm talking about being a human being and being addressed on my tape on my telephone by some of the language that I was and by some of the irrational, to me irrational and hysterical talk. Now, I can't imagine trying, as a young woman, going to the clinic for whatever reason, having to pass people who were yelling, and I've gone to clinics when they've been surrounded, and I also haven lived, live in a community where the clinic windows have been shot out and on and on, but I'm just talking about the last two or three days, and I find that hysterical, and I guess I really have a hard time with your identifying what is happening here that this is, that we're just being, the testimony we heard is hysterical. I'm just really having a hard time sitting here listening to that.

FAUSTIN: Can I answer that?

CHAIR: Mr. Faustin, yes.

FAUSTIN: Um, well, I don't know exactly what was said on your machine. Of course, I'm not responsible for that. If it was inappropriate, it was inappropriate. Period. But this Bill

doesn't address that. And it, if someone is going to act that way, then they can get a tape measure and they can measure themselves eight-feet and one inch, and say any foolish or wrong thing they want to someone, it's not going to change that. So, you know, that's not on the point of what we're talking about. It's not going to. I mean there's plenty of things people yell at other people, and they're going to continue to do that. It's not going to stop. What this Bill really deals with is someone who is legitimately trying to speak with someone, not to harass them, not to dog them, but to give them some information. "Here is a legitimate medical alternative. If you have problems, we can help you. Here is some information about abortion itself." So that's what I'm concerned about, and I think that's what this Bill is attacking. There's a lot of other ways to attack someone who is inappropriate in what they do or say, but this is not going to stop that a bit. It's just going to stop the good stuff.

RUPERT: I'd just like to, I'm just really responding to your very first statement as you sat down. As you countered what you heard before, you said, 'Oh, they're just trying to create a hysteria," and I, I just really reacted to that after what I just heard on my answering machine and talking in person.

FAUSTIN: That could be so, too, if on one hand you have someone saying hysterical, inappropriate things to you, I also think much of what has been said earlier this morning was of the same quality because it doesn't deal with the point of this Bill. It's talking about acid thrown on a floor. Well, that has nothing to do with this. If someone broke into the place, then that's burglary. They can be dealt with in that way. If they vandalize the place, this bill won't change that. But much of the testimony was, as I said, just not on the point of this Bill, not dealing with something that's happening within 8 feet, and

then, when we're talking about that, it's all of this talk of, you know, the same language, signs being shoved in their face, you know, that sort of thing. Screaming, spitting, and you know, that's just not the point.

CHAIR: Representative Kreutz and then Representative Morrison.

KREUTZ: Mr. Faustin, are there women in the leadership of Operation Rescue?

FAUSTIN: Yes, there are.

KREUTZ: I'm wondering, have the women gone in as patients to these clinics, for example, a pap smear that is under the cost of going to an actual doctor's office for a pap smear?

FAUSTIN: Have women in our leadership done that?

KREUTZ: Um hum.

FAUSTIN: No, I don't think so.

KREUTZ: That would be, you know, somewhat of a good idea in order to get a handle on how many women are going in for abortions and how many are going in for health care. You might look into that.

FAUSTIN: Can I comment?

CHAIR: Go ahead.

FAUSTIN: That still doesn't really have a lot to do with what we're talking about here. We're not concerned with people going in for pap smears or cancer tests. We're concerned with people going in that are going to have their children killed and, as Gary Jamieson said, they're dealing with about 4,200 a year of those at Planned Parenthood alone. Mayfair probably deals with a fairly similar figure. Susan Parks could probably say. So that's what we're talking about. If someone's going in for another thing, that's fine. Although there's plenty of better places she could to go for that healthcare. But our concern is a woman who is scheduled for an abortion to give her complete

medical information. She's not going to get the complete information on the inside. They will deny her that. They will not give her accurate and truthful information of what is developing inside of her. And from some of their literature, actually the information they give is blatantly false. Little sketches of, "This is what is inside of you," a little squiggly circle, where at the time when Planned Parenthood does abortions at every stage of abortion they do, that child is a clearly defined, clearly functioning human, and if they showed the woman that and dealt with her in an honest way, many of them would not continue with that abortion decision and so that's what hurts these places is when the people are given accurate information, and they start losing clients and that's what we're talking about here is a for-profit business, and every person who turns away from abortion is money lost.

CHAIR: Representative Kreutz.

KREUTZ: Thank you, Madam Chairman. Sir, I understand that you are out to help all the uninformed women in the world, however, you still have that right under this proposed law. You can still hand a woman information, it's just within eight feet. If she wants the information, then she can reach out her hand, and at that point, you can give her the information, so I don't see that this restricts you from that. It just gets the people out of their faces.

CHAIR: Mr. Faustin.

FAUSTIN: Well, if someone's going to be in someone's face, they're gonna do it anyway, you know, there's a big question of what "consent" means and, as I've said, I think the language here, in the whole civil remedy is to scare people away. So, that people will be afraid to be there for any reason, to speak with someone because of this threat. All it takes is one person, an employee of the place, to say, "I know how we can get rid of

these people. I'll come walkin' up the sidewalk and then I will sue them for showing me the sign, and we'll get 'em locked up in jail for six months for that." But how do you know if someone consents? Can you just walk up to them and? That's not defined here, what that consent means. But then we're talkin' about a sign. I think that shows a little bit more of the intent here. We're not just dealing with, "You can't shove this into their pocket or into their hands or continue talking to them if they don't want to." Just like holding a sign, and I think that shows the intent of this Bill, trying to shut down any kind of information given outside of places that do abortions.

CHAIR: Representative Morrison.

MORRISON: Mr. Faustin, you mention the opportunity for people to freely express themselves, those who are on the picket line. I, I need to ask a question a little bit about your organization because I have to wonder how, how do you educate your people in Operation Rescue? A question has arisen about how do you know, although you seem not to like the medical services that these clinics provide, but I don't think that's your decision to make. How do you train your Operation Rescue people? When I have seen youngsters at 12 and 13 and 14 years on the picket line in Colorado Springs. Just what do you tell them before they distribute information? I think they have a right. They should be informed. I think as an organization, you need to take that responsibility. Just as the other side, if you wish to inform the folks going into the clinic, then give me the background of how these people are trained.

FAUSTIN: Well, first of all, we're not responsible for all the picketing that goes on or all the people that picket in Colorado, so I can't speak to everything that happens. As far as what we are responsible for, or something that we organize, we do try to inform people. We have guidelines of how people should be-

have. Of course, you know, as anyone knows, you can't control everything someone does in any situation no matter what it is, so as hard as we might try to have people behave in a Christlike manner, you still might get fringe people who would behave in another way, but as far as an organization goes, you might say we have a code of discipline. Rules for behavior. How people should be. We don't tolerate standing outside of a place and screaming at people. We, as I said before, try to focus in on what someone is going in for, and if they're going in for an abortion, to give them alternatives, in some places, such as OBGYN's office, trying to let his regular medical clientele know "This guy does abortions," and many women would not be interested in having an abortionist deliver their child, so as an organization, as much as we can, we try to guide people in their behavior so that as we are there we are behaving in an appropriate manner as what we would call a Christlike behavior, not there to harass someone or all these other things that we would be accused of. And so, as I said, you know, we can't control everything that goes on. There's many pickets in Denver and around the state that we have nothing to do with. But so, if that answers.

MORRISON: Would the members of the audience. I'll withdraw another question.

CHAIR: The committee has to be on the floor in five minutes. We will be continuing this hearing on Tuesday morning, immediately after the legislature adjourns from roll call. It will probably be approximately 9:15. We will be in this room. Those individuals who are currently signed up to talk will be given the opportunity to speak and testify for or against the bill at that time. I will not, however, have an additional sign-up sheet, so if you were not signed up this morning to speak, we will have only another hour on the bill and I want to

give committee members the opportunity to ask questions of everyone who testified. I will allow two more questions here. Representative Benavidez and then Representative De Gette of the witness who is testifying at the current time, and then we will lay over the hearing until Tuesday morning, the 16th.

BENAVIDEZ: Representative Benavidez. Mr. Faustin, do you have a role in Operation Rescue? Do you have a leadership role? MAN: Yes, I do.

BENAVIDEZ: What is that, Mr. Faustin?

FAUSTIN: I would be a spokesman, as well as part of the steering committee.

BENAVIDEZ: Have you participated in these demonstrations around the clinic?

FAUSTIN: The things that Operation Rescue has done, I've probably been involved in most all of it.

BENAVIDEZ: What I'm asking, Mr. Faustin, and I'm trying to be objective, Mr. Faustin, is that you made a comment, and, you've made several comments in relationship to providing information to uninformed women pertaining to abortion, and I'm asking you if you've participated in providing that information to women in these information-giving times. How do you make a determination of who is informed or who is not informed in relationship to, you know, the pamphlet information or whatever it is you're providing?

FAUSTIN: Before you speak to them?

BENAVIDEZ: Hmm!!

FAUSTIN: Well, you don't know. Someone walking into a place, you don't know why they're going there. They're dead set on doing this, no matter what, or if they're someone who feels, "If I only had a few more dollars, I could keep this baby, or I could have this baby and give it up for adoption," but that's something that you would hope if you were given an

opportunity to speak with someone, and there's many times someone just walks past you, and you can't talk to them, or they're across the parking lot in a situation where you cannot be on the property, so you have no opportunity, but someone who an opportunity presents itself to talk, or to give them something, then you're going from a basis of you don't know what you know, here's some information that can inform them, and if the opportunity presents itself to discuss with them then you can find out what their specifies are, what their questions are, why they're doing this.

BENAVIDEZ: Madam Chairman.

BENAVIDEZ: In my last question. If you don't know which individuals are informed and which individuals are uninformed, as part of the steering committee of Operation Rescue, do you identify certain clinics, and is one of those clinics the Vine Clinic, in relationship to what your steering committee believes as the uninformed individual that need to go to a particular clinic and Operation Rescue goes there to inform those individuals?

FAUSTIN: Well, as far as the Vine Street Clinic goes, and Planned Parenthood, we haven't had anything officially to do with that for a couple, two and a half years, probably. We haven't organized anything there. There's another group, you know, a loose-knit group of people who picket there regularly, but that's not one of our activities, so I can't speak to what happens there.

CHAIR: Thank you, Mr. Faustin. Representative De Gette.

DE GETTE: Sir, I just have one question. I believe you testified that Operation Rescue teaches its people to be civil and to respect distances and so on, and my question to you is: Is it Operation Rescue's policy that it is a civil form of protest

to come within eight feet of someone when that person doesn't consent to you coming within eight feet of them?

FAUSTIN: Well, if the person doesn't consent, then, you know, if they're walking into a place, and they're just going to keep going on in, as far as being within that, you know, and dealing upon the point of this Bill, you know, within that eight foot, I mean, that's where everything that happens as far as passing out a leaflet or oral education, much of that would happen within that eight foot, so in that sense, of just trying to talk to someone, yeh, I think that's very important, just as here we are, sitting within three and-a-half feet of each other, and if we were wanting to carry on a meaningful conversation, this is about the distance that we would do that. Most people, if you'd think of how you talk to people, you don't fit here and they over there, and you have this nice conversation about what's going on with your life. You get closer to someone so you don't have to speak loud, if you want to give them something, and that sort of thing, so that's why I think that it's very important that we be allowed to be within that eight foot and to restrict us to be outside of That, then that cuts off that meaningful conversation, the passing of literature and things like that.

CHAIR: Representative De Gette.

DE GETTE: So you think you should be able to be in that eight feet whether or not the person consents. Because, of course, under my law, if someone consented to you coming closer to talk to them or give them a brochure, you could. So, it's your position that it's civil and appropriate that even if the person doesn't want to talk to you, take the brochure, have the bloody fetus thrumped in their face, you should be able to stand closer than eight feet and do that.

FAUSTIN: I think we should be able to be within that eight feet, and even if, you know, because sometimes someone's

walking past you and you start talking with them, you can't say everything you can say in one sentence. "Can I offer you some information?" "Are you here for an abortion?" I mean, that's question number one. You're walking along the sidewalk. You're going into the place. Maybe they're silent. Maybe they' re, "Are you here for an abortion?" They say, "Yes." Then, you're walking on. "Can I offer you some information on alternatives?" And, you know, the conversation builds. And so, to say that you walk up to someone and it has to be all done in one sentence, or something like that. See, to be within that eight foot doesn't imply just by being there that you're harassing someone. They might not be real interested. I mean, they're there for an abortion. They've got this problem. They want to take care of this problem. But after you talk with them, as you're walking down the sidewalk for 10 - 15 seconds, which most of the time you wouldn't get that because they're heading onto the property or something, it might be your last question that hits home, and then they're ready to talk, "Well, yeh, if I had some help, then I wouldn't get an abortion." But you're not going to establish that on the initial half a second sort of thing, and I think what this Bill is dealing with is coming from an assumption that our goal is to harass, so it's kind of like, "If you don't mind being harassed, then you can consent," but that's not what we're dealing with. It's an edu, I mean, as it speaks here for the purpose of education. Well, how long does education take? Is that something, you know, ask a first grader, do you want to be educated for the next twelve years? No. But it's a process that takes time. It can't be all done at once, so there might be someone who initially, they're resistant to what you have to say, and as I said before, there can be inappropriate things in ways that you deal with people, but what I'm talkin' about is the proper thing. If your goal is to educate, you deal

with that initial thing. You deal with something else, and you're hoping to find out where they're coming from. "Why are you doing this?" Because the truth is, and the abortion industry admits it, that most people going for abortions are doing so reluctantly. It's not something that they're thinking, "Oh, boy, I'm finally pregnant. Now, I can go get an abortion." And so why are they dealing with it reluctantly? Why is it such a difficult decision? And that's what we're there to help people with. If this is so bad of a decision to make, we can help you not make it.

CHAIR: Thank you, Mr. Faustin. Remember, the hearing will continue in this room on Tues. House Judiciary is adjourned.

- - - Tues. - - -

CHAIR: June Harrison.

HARRISON: Good morning, Ladies and Gentlemen. Thank you for this opportunity to speak before you today. My name is June Harrison. I'm a prolifer from Colorado Springs. I have been exercising my constitutional First Amendment rights of free speech and peaceable assembly for approximately the past ten years, mostly in the Colorado Springs area. I have been called every name under the sun. I've gotten the finger hundreds of times, and we've even had bomb threats. The last one was on our answering machine about two or two-and-a-half years ago. You have before you today House Bill 1209 proposing an eight-foot bubble zone and a suggestion of a radius of 100 feet of the entrance to a healthcare facility. According to this proposal, should the statute be violated, persons would be subject to a Class III misdemeanor. Both of these restrictions are clearly unconstitutional. The eight-foot bubble zone is seeking to abridge, and abridge is what's used in the First Amendment, and the definition of abridge is "to curtail

or lessen or deprive or put prior restraint on free speech." This includes leaflets and brochures, signs, pictures, and et al. The radius of 100 feet seeks to limit peaceable assembly. This proposed legislation is definitely discriminatory in its proposed limitation on free speech and assembly. Its limitation targets a small group of people whose actions another small group of people disagree with, certainly not worthy of becoming state law. However, according to the First Amendment, which guarantees the freedom of speech and the right of people to peaceably assemble this proposed Bill is contrary to First Amendment rights. There have been legal cases ruling bubble zones unconstitutionally abridge free speech in public places. Since you are the judiciary committee, I would suggest you study these constitutionally ruled cases very carefully before you make an unconstitutional decision to present to the House floor. Last month, at Stapleton Airport, I heard a public announcement over the loudspeaker that there could be people distributing literature in the area, that these people were exercising their First Amendment rights and people could either accept or refuse the offered literature. There is no eight-foot bubble around me to protect me from their approach. Should there be? Or will there be? Is there going to be a new law written every time someone doesn't like the activities of someone else? Peaceful demonstrations, pickets and protests are activities generally protected under the First Amendment to the United States Constitution. No matter how offensive the language may appear to be, there can be no absolute ban on a right to free speech or the right to peaceably assemble. Because of the unconstitutionality of House Bill 1209, I urge you to reject this proposed legislation. I thank you very much.

CHAIR: Thank you, Miss Harrison. Can you tell me which cases you believe have declared the bubble unconstitutional?

HARRISON: I don' t have them with me. I had a piece of other literature and had the cases and yesterday was a holiday and we did not have a chance to go to the law library to research those. But in a few days we could and we could send those to you.

CHAIR: Thank you very much. Are there questions from the Committee? Thank you for your testimony.

HARRISON: Thank you.

CHAIR: Diane Dillingham.

DE GETTE: Madam Chair, she was one of my witnesses, last time, and I don't see her here this morning. She is the chair person of Colorado Republicans for Choice and has volunteered for many years at the Vine Street Clinic in Denver. She was going to testify about the vast improvement in relations at the Vine Street Clinic since Denver adopted the eight foot bubble ordinance about how people came up right into people's faces before the ordinance was enacted in Denver and now how they stay eight feet away and it protects access. I apologize. I think with the weather she probably was unable to return.

CHAIR: All right, thank you. Lois Meyerson, or Mayerson? Linda Coat? Cleta Jasper?

JASPER: Good morning, and thank you for allowing me to speak. I am Cleta Jasper from Colorado Springs. The referenced bill appears written to violate First Amendment rights of sidewalk counsellors on public property around abortuaries. The prohibited activity includes engaging in education or counselling. We're told the women who choose abortion have done so as adults fully knowing the facts surrounding their choice and are ready and able to take full responsibility for that choice. Yet the drafters of this Bill seem to wish to see women treated as incompetents unable to fully

process further information or not needing to know. It sounds like "Big Brother." The legislature would deny a woman information, violate her right to know, and her right to choose to consider or reject what a sidewalk counsellor offers to her by way of voice or by pamphlet. It appears the desire to protect abortion seekers, and for that desire, I do commend you. However, the reality of the Bill is the protection of abortionists and their lucrative industry. Women, again, are the victims. Abortionists fear a woman's ability to cope with her problem pregnancy. They've been known to exploit her fears to keep her on their abortion table. They lose money if she changes her mind and goes home without being aborted. Not only are pro-lifers the people helping women with material and emotional assistance during her pregnancy, but they also pick up the pieces after her abortion and strive to bring the abortion-damaged woman back to wholeness without condemnation. Postabortion syndrome is a very real pain felt by multitudes of women after abortion. I've cried with the women over a table or over the phone if they hurt after an abortion. One friend told of her anger at the state of Florida for permitting legal abortion, and, in her mind, allowing her to take such a destructive action. Another said she was never told that there was any practical aid available to her if she continued to carry her child. So much for true pre-abortion counselling. Another said that all the way to the clinic, she was hoping someone would stop her. For her, there had been no sidewalk counsellor present. These are only three incidences, and I'm not a factual study, of course, but these expressions of pain were only one of many for each of these women. I urge you not only to kill this Bill, which would further exploit women, but also to pass legislation, but, also to pass legislation to insure that all women are fully and factually informed of all the options and all the facts before their

abortions. Support her right to know. And I thank you very much.

CHAIR: Thank you, Mrs. Jasper. And are there questions from the Committee. Thank you for your testimony. I understand one of the people that I called earlier has now come into the room. Diane Dillingham.

DILLINGHAM: Good morning. The reason that I've been asked to speak this morning is I was a volunteer escort at the Vine Street Clinic in 1988, which was before the so-called "bubble ordinance" Denver passed. Being an escort at that time was truly a frightening experience. We weren't afraid of signs, we weren't afraid of pamphlets, we weren't afraid of words. We were afraid of being physically assaulted, which we were numerous times. We were sorely afraid for our physical safety. The goal of the protestors at that point was to shut down the clinic. The goal of the escorts was to maintain access for the people coming to use those services and their safety while coming to obtain them. Most Saturdays we arrived at the clinic somewhere around 5:00 o'clock in the morning. We had to be sure that we could get in before the protestors arrived. Several staff and certain volunteers would spend the night at the clinic to insure that someone would be there. The protestors would arrive in caravans. They'd go to a central place to meet, and then all caravan down to their chosen target, and we would never know from one Saturday to the next whether we were to be the target or not. They were very well organized. They had even decided which ones were going to break the trespassing laws at that point. Their first action was always to block our driveway. I don't know if you've been down to the Vine Street Clinic or not, but there's a large gate, and they would gather there so that the cars carrying the patients and their families would not have access to our parking lot. As escorts it was our

job to leave Planned Parenthood's property, go out to the cars which were then forced to park on the street and escort the patients in. We were either issued vests or badges or T-shirts - it would depend on the day - so that they could easily identify us and tell us from the protestors. Then we would surround them. We'd put them in the middle of us, and we would walk them into the clinic. The people trying to stop their access would then surround us. They would push, they'd shove. Sometimes, they'd lose control and they'd bite us and kick us and pinch us. Always. It wasn't fun, but we had to put ourselves physically between the patients and the protestors. It was frightening, and it was dangerous, both for we as escorts and for the patients. After all the patients were into the clinic, the protestors would then try and storm the building. They'd climb over a fairly low wall in front, and they' d rush towards us. We would link ass and try and keep the door to the clinic open. Many times, the police were there. They would have mounted escorts, they would have dogs, and they would put themselves between us and the protestors. Most of those protestors were arrested for trespassing. The police would have a large bus out in back to expedite the hooking process. The only way that the other people, the ones who were physically harassing us, could be prosecuted is the police swore out individual warrants for assault. It was very difficult. They were working in a very crowded situation, it was very difficult to tell who was doing what in a situation as confused as that, and it would have been very difficult for us to say, "This person did this " "This person kicked," "This person shoved," and so they were almost never charged. You've heard a lot about the fact that the people opposing this law are really trying to educate. I'm sure this is true for some of them, but it rings very hollow to me, and it especially doesn't wash because we had as

much problem getting our patients out of the clinic as into the clinic. When they were leaving, we had as much problem protecting them as we did when they were going into the clinic. The anti-choice movement is aware that they are on the losing side of this debate, legally they've lost the battle, but they are well aware that the legal right to a procedure is very different from having access to that procedure. Their new tactic is to accept the legality of abortion but to make the procedure impossible to obtain. I ask that you support the clinic access law so that all people can have safe access to clinics, free from physical intimidation and harm.

CHAIR: Thank you. Are there questions for Miss Dillingham. Thank you very much. Leon, is it Gonzales?

MAN: (Inaudible.)

CHAIR: Mr. Garcia, Mr. Gonzales is the person who signed up, so, I'm sorry, but, in keeping with the original intent, you will not be allowed to testify, thank you.

MAN: (Inaudible.)

CHAIR: Mr. Gonzales. Thank you very much. Um, Herald Lambert. Would you please state your name for the tape. Thank you.

LAMBERT: Good morning. My name's Harold Lambert. I have a very brief prepared statement after which I will answer questions. I'm a registered Democrat. I have been active in the pro-life community in Boulder County since about 1980. I have picketed four locations in Boulder where abortions are performed, and I have also picketed the Vine Street location. Boulder has an ordinance for several years which is similar to the legislation being considered. When the ordinance was being considered by the Boulder City Council, the then Chief of Police, Jay Prost, testified that the ordinance was not needed. I would point out that no one has ever been cited under the

ordinance in Boulder. It is my understanding that three people in total have been cited, all of them on the same morning, at the Vine Street location. Charges were dismissed on two of them, and the third person was involved in the Desert Storm callup and has not returned to Colorado. I believe there are already well-written enforceable laws regarding harassment which are more than adequate to allow those seeking an abortion and those desiring to provide information to them to occupy the public sidewalks without infringing on each other's rights. I know you've heard testimony from those in the abortion business that many of the women who come for abortions have been emotionally traumatized by picketers. I cannot accept such accounts as reliable. In Boulder, there is only one abortion clinic where we have the opportunity to pass out literature. That's the Alpine Clinic, operated by Warren Hern. It is only picketed an average of about four hours per week. We probably have contact with less than 10% of those entering the clinic during the typical week. My own experience is that about 5% to 10% of the women entering the clinic accept the literature we offer. The only intense discussions I've had when picketing have been with Mr. Hern or one of his employees. Some of the picketing is on Saturday, when the front door is not used and those coming for abortions park in the rear of the building and enter through a door unseen by the picketers. I don't understand why Mr. Hern has any of his customers enter through the front door if he is truly concerned about their contact with picketers. It was mentioned last week that bullets had been fired at Mr. Hern's clinic. There is no evidence to support that the bullets were fired by pro-lifers or that Mr. Hern staged the event himself. Most of the women I offer literature to either say nothing and walk past me or they say no and walk past me. Those who accept the literature are more likely to talk

with me when they leave the clinic. The ones who have tried to use the bubble ordinance in Boulder are the clinic workers. I am aware of two cases in Boulder where physical contact occurred when the picketer was pushed or hit by a clinic worker. You should also be aware that at the Vine Street Clinic, we've heard a lot of talk about people shouting at people entering the clinic. The main reason for that is there is separation of 15 to 30 feet because the women generally drive into the parking lot and usually do not pass by the picketers on the sidewalk. I'm sure that you know that for millions of Americans, abortion is not a medical treatment but instead a serious moral issue. A moral issue that is far from being settled and is far from being an issue that the two sides can even agree to disagree on. I'm not going to try and define the positions of those who are pro-abortion and call themselves pro-choice, but those who are pro-life deeply believe that a person is killed each time an abortion is performed. This bill unfairly penalizes pro-lifers' ability to present the other side of this critical issue by restricting their right to pass out literature. This Bill would essentially give abortion clinics ownership of the public sidewalks which has traditionally been a protected area for First Amendment rights. I might point out some practical difficulties with the law. Many sidewalks are less than or are barely eight feet wide. Are prolifers supposed to leave the sidewalk to maintain an 8-foot buffer? What if I'm standing on a four-foot wide sidewalk and a person begins to approach me from 20 feet away and I begin to talk to that person. I stop my own movement but continue talking to them as they continue to narrow the distance between us and pass within four feet of me on the sidewalk. Have I violated the proposed law? Remember, I stopped moving when the other person was 20 feet away. If you have not already done so, I suggest it would

be useful for you to visit several clinics unannounced and observe picketing activity. I also suggest you talk with the police in Boulder and Denver. The picketing activity is no different now than it was before the ordinances were passed, and there has been no one arrested and no one even cited in Boulder and, actually, no one has paid a fine in Denver. If these ordinances were needed, there would have been numerous picketers cited in the last several years. Since there have not been, it appears the only purpose of these ordinances have been to try and intimidate pro-lifers from their constitutional rights, and I suggest the same will be the case with this Bill.

CHAIR: Thank you, Mr. Lambert. Are there any questions from the Committee? Thank you for your testimony. Paul Ruzicka.

RUZICKA: Hello, my name is Paul Ruzicka, and I've been a volunteer escort at the Vine Street Clinic for the past three-and-a-half years. I've been there almost every Saturday during that time and, occasionally, on some other days when I've had my time off from work. First off, I want to say that one major difference between this Bill and the Denver ordinance which makes this Bill better is that it's assumed to be active all the time, whereas the Denver one has to be invoked each time by a patient coming in and most patients don't realize that the law exists and, therefore, that's one reason there hasn't really been much use of this in time for citing people because the patients have other things on their minds and not are really thinking in terms of the ordinance. But I just want to let you know that protestors are there all the time, shouting and screaming. There are some that are reasonably rational, but there are many others that are just gone. They will even shout and scream at cars, you know, at the people coming in through the driveway, and this in effect also creates a safety issue because they will be

partially blocking the driveway and walking very slowly coming in, trying to shove information into the car during warmer weather when the windows are open, and this really does not, you know, aid in that regard. If at least this bill keeps them off the driveway, there'd be less of a safety issue, that would be one extra benefit from it, because there is a safety issue in that area because They often put large signs up on either side of the driveway which prohibits people from actively seeing traffic coming and going on the street and, also, patients coming in cannot see the protestors on the driveway. They will shout at anybody coming in, male, female, it doesn't matter. They have no way of knowing who is coming in for an abortion. I, as an escort, don't know exactly who is coming in for an abortion, who is coming in merely as a friend or a family member. They will scream at everybody. There was even one instance I recall where a delivery truck came in, might have been UPS or something, and they were screaming at the delivery person for helping out murderers and child killers, and this delivery person come in to ask for directions, wasn't even there to deliver a package. Last week, Mr. Faustin suggested that this bill would abridge the right of free speech, then. I suggest that whether you're one foot away or eight feet away, the words have the same impact, the same meaning and they can be just as abusive, but at least they are not in the people's faces. They still have the right of handing out information if the people so want it. If the patients do not feel as though they are getting accurate information, they can always come back out and ask for the information or even go to a place called the library where they can have even more information. I don't know if they know that tactic, but a library is a good place for information, if somebody doesn't feel they're getting it. The clinic helpers do give full information. There was even one

instance I know where one counsellor told me of a circumstance where one patient did not really want to have an abortion but felt that she could not financially afford it and this counsellor actually gave this patient the names and numbers of some of the anti-choice groups who claim to give financial aid. So they are giving information out (inaudible) as well as other areas. This law is needed just to keep things down at a lower level of, just to keep things down on a little more less emotional level. I would even guess that a majority of the people coming into the clinic, when you count all the significant others - boyfriends, family members, people coming in for other services or information - the people coming in for an abortion are probably in the minority. But they will yell and scream at everybody, and our job as escorts sometimes is in a way to protect the protestors, because sometimes, some of the boyfriends, fathers, husbands, really get upset and want to go out there and hurt them and by keeping them away we have a better chance of preventing this sort of thing all around. So I urge you to support this Bill, please.

CHAIR: Are there questions for Mr. Ruzicka. Thank you very much. Virginia Tully. Jeannie Hill.

HILL: Madam Chairman and members of the Committee, I want to thank you for hearing me today. Before I start, I would like to submit to you 13 copies of 10 questions for each of you that I think are important to consider before you pass this Bill out of, even out of committee.

CHAIR: All right. Staff will bring it.

HILL: Okay.

CHAIR: Please state your name for the tape, Mrs. Hill.

HILL: My name is Jeannie Hill.

CHAIR: Thank you.

HILL: I'd also like to submit for the Chairman, my testimony, and I'd like to submit my sidewalk counselling work book which is gone in all parts of the world. It's currently being translated into Spanish for South America. There is also literature that we hand the mothers outside the abortion clinics, and I'd like you to look this over, and I think you'll come to the conclusion that there is no malice involved here. You received a copy, last week, of Jean Otto of the Rocky Mountain News article. Several years ago, I took this out of the paper. I've given lots of copies of this, probably a hundred copies, to friends, people around the country. She emphasizes in this that our freedom of speech is the keystone of all of the other freedoms that we have in this country. I think if this Bill passes out of the legislature and becomes law, we'll be setting a horrible precedent for our Bill of Rights in this country. I'll begin by saying that I'm a sidewalk counsellor because I became aware that Planned Parenthood and other abortion providers in Colorado were selling their abortions by misrepresenting the truth, distorting the truth, obscuring the truth, telling lies to their own prospective patients, and I have proof of this in 71 pages. One bereaved abortion patient from Dr. James' Park Mayfair Clinic is seeking legal recourse for the doctors grinding up her baby's body in a manual meat grinder without her permission for this type of disposal. She's not the first, and she'll not be the last to be bitterly disappointed in the abortion counselling she received by providers of abortion. Choice was denied. And choice is denied at abortion clinics throughout Colorado. My organization was built to provide women the opportunity to review all of the factual medical and biological information before having an abortion. If you pass this Bill, you're taking the right to privacy of an individual and the right to privacy of the medical facility and its staff and

overlaying them onto the public sidewalk where the right of free speech has preeminence. Why are you limiting yourself here to a hundred-foot bubble? why not extend these rights for a quarter of a mile or to the Denver city limits, or even to the borders of the State of Colorado? This law is more like a blanket. It hides the truth. This Bill makes an illogical assumption that all people do not want to be informed of the facts. Remember that some people do. The state should be guaranteeing access to our kind of information instead of creating an obstacle to it. Whose priorities here are trying to control the rights of others? Does our government, as well as Planned Parenthood, have a priority of making choices for women? The police hired by Planned Parenthood stand in the parking lot and offer to press charges for the patients, but the patients aren't interested. Because of Planned Parenthood's failure to interest their patients in filing charges against us they've had to search for anyone who will. Their off-duty hired guns are more than willing to comply. Other non-patients will volunteer to make a charge. Anyway, it's apparent that Planned Parenthood has their own best interests at heart in seeing this law passed. Our speech, although well tolerated by the patients, is proving to be poorly tolerated by those who sell abortions. I believe that a need for a law by patients was either misrepresented to the sponsor of this Bill, or it is believed by its sponsors that the State has a compelling interest in protecting Colorado's abortionists from losing business. The proof is in the lack of evidence that abortion patients have felt any threat to their right to have an abortion and the mass of evidence that the threat is instead to those who choose to sell abortions. Where is the evidence that those seeking medical care or abortions have a need for an additional law for protection of their right to seek abortions? Have you researched this

perceived need? Have you asked how many charges filed against pro-lifers have come from patients, have come from medical patients? I think probably none. And I think you should research that. How many patients have pursued the existing remedies, any of the existing remedies, such as disturbing the peace, harassment, disorderly conduct, the bubble bill ordinance that exists now? And why have they not? Because they either choose to not or they have no complaints at all. Now, since 1985, at Rocky Mountain Planned Parenthood Abortion Clinic on 20th and Vine Street, according to 1990 statistics, they have aborted approximately 27,776 patients. Out of 27,000, you'd think we'd have at least one or two complaints. Check it out. How many charges have instead come from abortion clinic staffers and nonpatients who volunteered to file complaints against pro-lifers? How many acquittals or not guilty verdicts of pro-lifers defending themselves against abortion clinic workers and not patients have there been in the Denver courts over the years that would suggest harassment under color of law toward our own people instead of the patient? I know of about 26. I offer this last question to suggest that because the abortion providers have failed to prove a need for someone else's protection through the court system, you certainly cannot prove that they have any need for the current bubble ordinance. They are making a last ditch effort to choose for others what they need by using you lawmakers to give permits to people to license my free speech. The basis of this law is hearsay from people who profit financially from abortion or who volunteer for the abortion cause. They give testimony to convince you that other people must have a need of this law. Do you believe their testimony? If so, you'll be passing a new state statute on the word of abortionists instead of evidence from the people the law is

designed to protect. You might say the court system has failed. Planned Parenthood and other abortionists, both on the local and the national level. So now, they're appealing, both nationally and locally, for the legislative bodies to give them what the courts will not, an unencumbered right to sell abortions. Courts require proof, you know. Legislative bodies do not. This proposed law is hyporcritical as far as the State of Colorado is concerned because on the one hand, you're saying that all women, no matter what her age, in the State of Colorado, are old enough to decide when to they can use birth control, an IUD, get a surgical abortion, get pregnant, have a baby. But, on the other hand, you're saying these same women are not mature enough to say, "No, thank you, I don't want your conversation or your literature." I would like for you to avoid haste in passing this Bill out of committee today. If you pass it on, you're really saying that speech in Colorado is more dangerous than the licensing of speech. I have discussed this matter with attorneys who believe that this Bill poses a substantial threat to both the Colorado Constitution and the United States Constitution. I'm advised that if this Bill is adopted as law, a cause of action will be available to me to challenge the constitutionality of the law. And, like Roe v. Wade, I won't need to wait for a denial of my rights in order to challenge this law, because the law itself will be a threat to me every time I go out onto the street near a medical facility. Thank you very much.

CHAIR: Thank you, Mrs. Hill. Are there questions from the committee? Thank you for your testimony. If you would like to leave that with staff, and they'll bring it to me. Thank you. Nancy Jenkins.

JENKINS: Hello, my name is Nancy Jenkins. I am a patient of Mayfair Women's Clinic, and I am also a patient of Planned

Parenthood of the Rocky Mountains, and I have, through our current laws, filed complaints against these protestors. I am here to talk to you today about the viewpoint of a patient. In 1981, I had an abortion at Mayfair Women's Clinic. had to go through counselling both at my home medical facility and again through the counsellors at Mayfair. The information I got was thorough, in my personal case, more thorough than I wanted it to be. I was dying of cancer. I was on chemotherapy. I did not have a choice. It was my life. I would also like to tell you I am an escort at Vine Street, and I have been an escort since 1988. I have been involved in the Operation Rescues, when they became violent. I have been hit by men twice my size while trying to get 12 and 13-year-old patients into the clinic, protecting them with my body. I have also worked at Planned Parenthood as an employee. I have dealt with patients after they have come in, after they have been yelled at and harassed by the protestors. It is intimidating for any patient to drive to our clinic because there are cameras. As far as the 8-foot ordinance, it has helped at our clinic. The reason it has helped is that when I go out into the street to either tell a patient to drive into the clinic or if their mother, father, spouse, husband, boyfriend or friend is waiting for them, to tell them to please drive into the clinic. It gives me a way of telling the protestors to get away from me while I inform them what is going on. Two weeks ago, I had an incident where I had a patient inside the clinic. The mother was parked out on the street because she could not get through the driveway because Al Garcia and other protestors were blocking the driveway. I went out onto the street to try and get her to roll down her window enough so I could tell her to please come pick her daughter up, who, by the way, was there for the results of a pelvic exam, not an abortion. The minute this woman even cracked her window, five

pamphlets were shoved into her car against her will. I at that time informed the protestors they needed to back away eight feet or I would call over a police officer. They did so. The woman drove in safely, and the protestors remained safe from being hit by her car. I feel this ordinance would also, as Mr. Rozicka stated, protect the protestors. I have more times than I can count put myself between a patient's significant other and a protestor, often thinking "Why am I doing this?" To save them from clobbering a protestor who is screaming and calling them names. I have been called numerous names. I have watched these people try to counsel patients and the process goes that they will intimidate them into stopping either physically or with their words and then try and give them literature. I do not consider this counselling. And it is my personal experience as an abortion patient that the information has already been given. This law would also give a buffer zone to the patients so that they could gain access to the clinic and it could be a little bit more passive of an experience. It is a very traumatic experience to go through an abortion. I can tell you that first-hand. It is not something that I would wish upon any woman, but it is a necessity, and I thank God every day that it was legal. I now beg of you to pass this ordinance so that other women may have safe access to an already legal procedure. Thank you.

CHAIR: Thank you. Are there questions for Mrs. Jenkins? Representative De Gette.

DE GETTE: Thank you, Madam Chair. Mrs. Jenkins, have you found in your experience that the protestors seem to be aware of the 8-foot bubble in Denver?

JENKINS: Yes. At our clinic, they do, in fact, they often yell at us to stay 8 feet away if we go out on the street, so they also use this ordinance to protect themselves.

CHAIR: Representative De Gette.

DE GETTE: And, in your experience in dealing with this Denver ordinance, are people still able to communicate from 8 feet away, just not harass or intimidate?

JENKINS: Most certainly. Like I said before, most of the protestors who yell at a patient get their attention. If the patient wants to gain information at that point, they will then approach the protestor. You can most certainly hear them for more than 8 feet. They show up with megaphones. They're screaming. We have disturbing the peace complaints filed weekly on these people, by the neighbors who are woken up early every morning by them. They' re there five days a week. So, yes, they can be heard, and if the patient wants information, they often will then approach the protestor to see out of curiosity or if they feel a need more information.

CHAIR: Are there further questions for Mrs. Jenkins from the committee? Thank you very much.

JENKINS: Thank you.

CHAIR: Mark Simon.

SIMON: Madam Chairman and members of the committee, thank you. My name is Mark Simon. You've heard an awful lot of talk the last couple of days about abortion clinics, and I think I'm going to put a little different slant on the viewpoint here. I have passed along copies of a support letter for this Bill from the Colorado Coalition of Persons With Disabilities. The reason they're supporting this Bill, among other things, is recently there have been two other incidences where people have been impacted by protestors, have you, that were not abortion patients while trying to enter a medical facility. The most recent one was, if all of you recall, there was a gentleman in Pittsburgh, recently, who received a baboon liver, who was dying of hepatitis, and that was the only possible way to save

him. He became the target of animal rights activists. In the last six months, there was an incident in Florida where a person with a disability became a target of anti-Medicaid protestors, to use that liberally, and he ultimately ended up being assaulted and knocked out of his wheel chair. I myself have had 35 separate surgeries in the last 8 years. I can tell you, it doesn't matter if it's the first one or the 35th one, it never gets any easier. Each and every one is tough. And the night before and the morning of any medical procedure that's invasive is the toughest part of all. You don't need additional stressors placed on you while you're trying to do it. I and my wife personally don't necessarily agree with the concept of abortion, would never consider one, but would fight to the death for an individual's right to make their own medical decisions without outside influences. That comes from language from a Supreme Court decision. I also agree that people have their own right to express their freedom of speech. The question is where do you draw the line. As a great jurist, Judge Learned Hand, once said, "Your right to swing your fist ends where the end of my nose begins." When you want somebody to step back to give you room, you've got a right to that. We all know about our own personal faith. You don't need somebody standing in your face screaming at you when you are going in for what may be one of the most traumatic experiences of your life anyway. Why make it more traumatic? Why cause further psychological impact? I have to support this Bill on moral grounds, on the grounds that an individual's right to make those decisions outweighs another individual's right to express their free speech to the degree that they attempt to impose it on the first person. I think that they had the right to exercise their right to free speech. I've done it myself. I've parked my butt out on street corners with protest signs before, but I don't force it on people. If they want the

information, I'm there. But I'm not gonna get in their face and demand they hear it. I think that's all I really have to say. I just hope you all will support this Bill because I think that it's gonna impact others besides those seeking abortion, and, as the right-to-life movement seemingly gains momentum, others are drawing from their tactics, and that concerns me a lot. Thank you.

CHAIR: Thank you, Mr. Simon. Are there questions from the committee? Thank you for your testimony. Carol Carner.

CARNER: Good morning. My name is Carol Carner, and I thank you very much for allowing me to speak today. Pro-life citizens engage in different types of activities outside abortion facilities. Some block the entrances. Others pray silently. Some people on both sides of the issue engage in shouting matches. But there are many pro-life citizens whose sole purpose is to offer information and help to the girls and women going in for abortion. These citizens are not confrontational. They are gentle volunteers who are truly concerned for the women and the babies. Many of them offer financial help and even offer to adopt the babies, and yet, they attempt to tell the women the truth about development of their babies and the physical and psychological dangers of abortion. This is what I would like you to consider today. Businesses always try to promote their product or service. This is only natural. It is true of any business. Recent news stories have even exposed misleading advertising practices by the medical profession. The fact is abortionists, like persons in any other business try to cast their business in the best possible light. In so doing, they may not be completely honest about their services. To document this statement, I will ask permission of the Chairman to give each member of the committee this two-page packet. The first page is copies from the October 1990 issue of a

magazine called New Dimensions. The psychology behind the news. In this excerpt are statements by former owners of and workers at abortuaries telling how they would purposely color the truth about their business in order, in their own words, to sell abortions. The second page is a copy of a page that Planned Parenthood of the Rocky Mountains used to give to their clients who insist upon knowing about the babies inside them. As you can see, that information is completely biased in favor of promoting abortions. For example, last year a spokesman for Planned Parenthood testified here, in the capitol, that they do not perform abortions until the eighth week. On this page you will see a straight line showing the approximate size of an eight-week fetus. And attached to that page is an actual photograph of an eight-week fetus. Certainly, a client who is given only the Planned Parenthood page would not have any idea of how well-developed that fetus is. Most clients of abortionists do not listen to the people who are trying to offer them information, but consider those clients who are not really sure of themselves, women who really want to know the whole truth, women who might reconsider their abortion if they knew the whole truth, women who, if they learned the whole truth only after having had an abortion, might have a deep, lifelong regret. For the sake of these women, I urge you to reject House Bill 1209. Do not make it illegal for caring people to offer truth and help to these women. Thank you.

CHAIR: Thank you, Miss Carner. Are there questions from the committee? Representative De Gette?

DE GETTE: Thank you Madam Chair. With respect to the second page here, that you say Planned Parenthood gives out to people, I don't see any identification anywhere on this page that it's a Planned Parenthood document. Can you tell me if it's a curent one, if.

CARNER: It's not a current one. It's one they used to give out.

DE GETTE: Thank you.

CHAIR: Thank you. Are there any further questions? Dean Nichol.

DE GETTE: Madam Chair, as you know, Mr. Nichol is the Dean of the D.U. Law School, and I thought he would be back this morning. He was here all morning, Friday. He was going to testify that he's analyzed this Bill, particularly the bubble part of it, and believes it could be constitutional. what I would like to do is, in my closing, I will address some of those constitutional issues rather than taking up your time now.

CHAIR: Okay. Representative, De Gette, I, for one, would appreciate some citings of the cases that he would have testified to.

DE GETTE: Thank you.

CHAIR: Connie Anderson.

ANDERSON: Representative Adkins and members of the committee, I'm Connie Anderson. I'm state coordinator for Colorado NOW, National Organization for Women. I'm here speaking on behalf of the organization. I don' t know how many of you have ever found yourself in a crowd which was out of control. I have on about two or three occasions. One was a New Year's Eve rampage to get into a theater where seats were limited. One was at the Super Bowl that we lost in New Orleans, and I, personally, am never happy with being in that type of crowd. And, in each case, I sought the periphery very fast. These people are frequently out of control. I'm sure that many of you know of people who have been caught up in soccer matches. It's the same thing. Rock concerts, etc. And I bring this out because of the comparison between what happens at some event like that and what happens at Vine Street and other clinics around this nation. I personally have

also been on the line as an escort at the Vine Street Clinic. I have also been on the lines as an escort at Wichita Kansas Clinic. Excuse me. I'm having a very uncomfortable time sitting back on this chair. I think this will pass very quickly. Anyway, at this time, I find that this particular problem is one that is so concerning me that I came forward to speak, came in from Aurora this morning on a very cold day to tell you that I do not think this is persuasion. I don't think this is an exchange of ideas. I do not think it is even intimidation. I think it totally bullying. There is no question that these people are not even really concerned. All they want to do is impose their ideas and their doctrine on others. If someone comes to my door and wishes to talk to me about religious values, I have the option of saying, "Thank you very much. I appreciate your coming by." I hopefully am considerate and that they too are considerate. I find nothing similar in what happens in the abortion clinic. Now, when I have been on the lines down there, I have also seen times when literally - I'm not speaking figuratively - literally, traffic has been stopped on a state highway for the demonstrators to pass out literature to passing automobiles, people who have no concern whatsoever. They're on their way to work. But they have impeded traffic. They have imposed their will on other people because of their zealous feelings about this issue. I also object to the use of the term "pro-life." I find myself very supportive of pro-life. I am so anti-the death of anyone. I see things happening in our world today. I see things happening right here in our own society in Denver, in the metro area, where death is the end result. No, I am not pro-death. I am pro, very pro-life, but I am also very prochoice. I would like to say to you that there is no one who has spoken more clearly on what goes on at the clinic than Ms. Dillingham who was up here previous to me, and I won't go through and

reiterate everything that she has said, but I will tell you that I have observed and also been a part of many of the actions that she has described. I hope you will think very long for the women of Colorado to give them the right to make their own choices, make their own decisions in a relative bubble, if you will, of some peace and guiet and a little serenity as they have to go in to make these decisions. I appreciate your support. I hope you will vote for 1209, and I thank you for the opportunity this morning.

CHAIR: Thank you, Miss Anderson. Are there questions from the committee? Thank you for your testimony. That concludes the testimony on House Bill 1209. Representative De Gette, would you like to sum up?

DE GETTE: Thank you very much, Madam Chair. Madam Chair, you've heard from a number, and committee, you've heard from a number of witnesses over the last several days about, and the testimony has primarily focused on family planning clinics. However, I think it's important to realize the overall purpose of this Bill, which is not directed solely toward those types of clinics, but, rather, towards the right of any patient to seek the medical treatment they need. And I was very grateful for the witness who testified that protest can take other forms of expression: anti-Medicaid, anti-animal experimentation, and so on. But society has to balance the rights of people to protest against the First Amendment right of free expression, and I think we'll all agree that there is a very important right that is important for our sake to protect our people to go into clinics. You have heard testimony that Planned Parenthood has. Only 7% of their procedures are abortion procedures. Yet women going in for potentially life-saving procedures are intimidated and blocked in various ways, both physical and psychological, from entering clinics. It's

against that background that we have to look at how to protect people's rights to enter the clinics and, again I apologize to the committee that Dean Nichol was not able to come back this morning. However, many of you know that I've been a practicing lawyer for 11 years and have done a substantial amount of constitutional work in my practice and, when I initially began to look at an ordinance of this type, I was very concerned about that balancing of First Amendment rights versus people's rights to health care access. I've worked very closely with a number of lawyers to draft a Bill which we believe to be constitutional. People who come to you to say that they have an unrestricted right to free expression are not accurate. It is well established under the Constitutions, both of the United States and of Colorado, that the state can enact reasonable time, place and manner restrictions if there is a societal interest that needs to be, that can be weighed against the First Amendment right of free expression. However, those restrictions cannot be unreasonable. Based against that backdrop, we developed the 8-foot bubble concept in looking at how can we protect the patient's right to be free from the kind of spitting, the kind of intense intimidation and physical threat that they are now, while at the same time protecting the rights of people who are trying to counsel them and talk to them. Eight feet is far enough so that you can't get up into someone's face and stop them from moving. However, eight feet is also close enough so if you say to someone, "Would you like to take a pamphlet?" or you say to them "You're killing your baby. I'd like to talk to you about that," that person can clearly hear and see what you're saying and, if they're interested in receiving your information, can consent, which is why, in subsection 3 on page 2 of the Bill anybody who consents, the bubble is broken. In other words, if someone. is coming up to me as a patient saying, "Will you

take a pamphlet," I reach out my hand to take the pamphlet, that's consent. And they can come closer than the 8 feet to hand me the pamphlet. Similarly, if I walk up to a protestor who's standing on the sidewalk with a sign or whatever and ask for more information, I am consenting to that 8-foot bubble being broken, as a patient, so that can be broken if the patient consents. And I believe that that is a reasonable time, place and manner restriction and, in fact, it is substantially less than many other cases have allowed. I will talk about that briefly. There are a couple of cases which I know some people are concerned about with respect to time, place and manner restrictions. One of them is a Hari Krishna case out of the U.S. Supreme Court from the early 1980's. In that case, an airport completely banned all pamphleting and solicitation of funds in the airport by the Hari Krishnas. The U.S. Supreme Court said that that was impermissible because it was a complete ban on any distribution of literature. However, there are additional cases, including the Hefrin case from 1981, which says airports can control where Hari Krishnas stand to hand out their literature and in that case, in fact, what they said is the Hari Krishnas had to stand in a completely separate part of the airport, which was less busy than where most of the passengers were, and that was approved under the time, place and manner restrictions. In a 1992 case, a recent Hari Krishna case, the Hari Krishnas, oh, that was the one I was just talking about that allowed the restrictions in the airport. In the Hefrin case, that was a case involving a state fair, where they told the Hari Krishnas they had to stand in one place to distribute their literature, that they couldn't circulate through the crowd, and, again, that was held by the U.S. Supreme Court to be a reasonable time, place and manner restriction. In a 1988 case, the Frisbee case, the U.S. Supreme Court upheld a local ordinance which banned all

picketing on public streets outside of private residences. That law was aimed at anti-abortion protestors who were picketing outside of a doctor's home, and the U.S. Supreme Court said in that case that the local municipality could outright ban all picketing in front of that doctor's house. Finally, there are several other localities whose clinic ordinances which are more restrictive that control free speech even more than the 8-foot bubble does, have been upheld. I will talk about a couple of them just briefly. There is a case out of San Diego Superior Court in 1984 where the local ordinance held that 60 feet away was an appropriate restriction. In other words, protestors couldn' t come any closer than 60 feet away and the California Superior Court upheld that kind of restriction. In Pennsylvania, a 10-feet bubble, not an 8-foot, a 10-feet bubble was upheld by the Pennsylvania Court of Common Pleas. In Washington state, 15- and 10-foot bubble ordinances respectively were upheld. And, finally, in Florida, they had a 25-foot buffer zone, and that was upheld by the Florida Circuit Court, so buffer zones substantially larger than the 8-foot buffer zone I'm talking about have been upheld. I pointed out to this committee in my opening statement that the Boulder ordinance which this Bill is partially patterned on has been upheld in the U.S. District Court in Denver by Judge Weinshienk, and Judge Weinshienk said, and she cited to a bunch of the cases, she said that she thinks that what we are doing here is balancing First Amendment against right of expression, and she feels that it's an appropriate balancing. If anyone would like to look at her opinion, I've shared it with a couple of committee members. In short, what we're looking at is a governmental interest in people's access to medical clinics but at the same time protecting First Amendment free speech. I believe this is a reasonable time, place and manner restriction. After extensive

consultation with a number of directors of medical clinics around the state in areas which are not protected by either the Denver or Boulder ordinances, I am convinced that the only real way to give this kind of protection is by use of a buffer zone of some kind. If you look at paragraph 2 on pages, on lines 10 through 12 on page 2, it is a misdemeanor if somebody obstructs people going into a clinic, but it is very difficult, as you have heard many witnesses testify, to determine in a court of law exactly what that is. We need the kind of protection that an 8-foot buffer gives us, and I believe it is constitutional. As you heard, at least one of the witnesses testified, that protestors understand the ordinance in Denver, at least, very well, and they respect it. That gives everybody a little distance. It gives people going into clinics the ability to make the choice of whether or not they want to accept literature or oral counselling, and it gives the protestors the right to also make their point of view known, so for all of those reasons, I believe this is a good Bill. It's needed right now in Colorado, and I would urge you to support it and pass it to the floor with a favorable recommendation.

CHAIR: Thank you, Representative De Gette. I have a couple questions that perhaps you could address for me. In reading the Denver ordinance, there are some distinct differences between the way House Bill 1209 is drafted and the context of the Denver ordinance, for example. And, first of all, in the Denver ordinance, it says that immediately upon request of a second person - in other words, there is an action that's involved by the person who's being handed the leaflet or is being approached, then, secondly, it also says down in there, without limitation, such imperative statements such as "Stop. Withdraw. Back off. Get away or leave me alone," shall be sufficient to constitute a reguest under this section. I

understand what, where the initiation comes from the Denver ordinance. I don't understand the same thing when I read, particularly, section 3 of this Bill. Would you address that, please?

DE GETTE: Thank you, Madam Chair. I will. I considered a section of that nature in my bill. My concern was that if you define in the legislation what consent is, in other words, you know, "stop, get away, back off" and so on, you may actually be restricting someone's free expression like who wants to give a leaflet and the person wants to consent in a different way other than using words. And so, what I did was, I put the burden on them to stay away unless some kind of consent was given, either verbal consent or nonverbal consent. My concern, frankly, is the person who is, who is leafletting. Someone's walking down the sidewalk, and they say, "Here, would you like a leaflet?" The person puts out their hand. That's not any kind of oral, oral indication one way or the other. I'm concerned at least that in the Boulder ordinance and perhaps the Denver ordinance that even though the person puts out their hand, they couldn't break that, that bubble. And so that's why I took any oral requirement on the part of the person gaining access one way or the other, as I think it limits the protestors, it unduly could limit the protestor's right of free expression.

CHAIR: In the Bill as it is constructed now, how do you anticipate that a filing would be made? What kind of provability under Section 3 do you see?

DE GETTE: Basically, what the State would have to prove under - by the way, I intend to offer an amendment to Section 3, line 13 page 2. This was just a drafting error which I actually realized last night. here it says, "No person shall approach," it should say, "No person shall knowingly approach," and I will offer that amendment. So, given that, what the requirement

will be is since it's a criminal statute, if someone is arrested for violation of that Section, what the State would have to prove is that the protestor knowingly approached someone within 8 feet for the purposes of, of protesting or passing a pamphlet, everything that's delineated in Section 3, and the other person did not consent. And the State would have to prove all of those elements, of course, beyond a reasonable doubt.

CHAIR: Thank you. One last guestion, the difference between, another significant difference inmy mind between the Boulder and the Denver ordinances and House Bill 1209 is the civil damages section in the legislation. I guess I have fewer problems personally with civil damages on lines 10, 11 and 12 on page 2, but Section 3 gives me a lot of problems because of the potential chilling effect that you have there. Money does, indeed, and the threat of huge monetary damages does, indeed, have a chilling effect on free Speech.

DE GETTE: Madam Chair. As you know, we discussed this yesterday, and I know an amendment will be offered. I believe it's 002, to strike the civil liability under Section 3 to avoid that chilling effect, and I have no objection to that amendment because the civil liability under Section 2 will still be there, so, again, you know, I don't have any objection to that.

CHAIR: Thank you. Are there any other questions from the committee. If not, there's no further discussion, House Bill 1209 is on the table for action. Are there amendments? Representative De Gette.

DE GETTE: Madam Chair, I move to insert the word "knowingly" on line 13 of page 2 between the words "shall" and "approach."

KNOX: Second.

CHAIR: It's been seconded by Representative Knox. Discussion. Would you please outline why you believe that makes the difference, therein, please.

DE GETTE: Yes, thank you. For any criminal statute, you have to have some kind of culpable mental state, and when we drafted the Bill, if you'll notice both paragraph 1 that starts on page 1, paragraph 2 on page 2, include the, the requisite mental state for "knowingly." It was just inadvertently left out of paragraph 3.

CHAIR: Is there further discussion? Is there objection to insertion of the word "knowingly" in that paragraph? If not, staff will record a Chairman's vote.

KREUTZ: I would introduce 001, if there's second, I would like to discuss it.

PAPER SHUFFLING AND PEOPLE MUMBLING.

MAN: I'm thinking.

CHAIR: All right, it has been seconded for discussion. Representative De Gette, I have discussed this with you, as well. I, I'm really struggling with balancing of the rights here, and I don't have a problem creating the misdemeanor portion of this. The bubble concept, I'm still troubled about how, how we're going to enforce this, and I offer this amendment as just an alternative, and I guess I would be interested in your comments about the language. To explain to the Committee what I've tried to do here. I've tried to expand the scope of (2) to include some sections of our current menacing statutes under this misdemeanor action and, also, if you'll look at (c) there, and I will just read from 18-9-111, which is the section that I had asked drafting to pick up here. And, explain to you, the provisions that would be carried forward here, (c) under harassment is strikes, shovesr kicks or otherwise touches a person or subjects him to physical contact, so if you see down

there in lines 11 and 12 on 001 it does reference that language which in the parenthesis (a) there. In parenthesis (c), the language is "follows a person in or about a public place," and (h) is "repeatedly insult, taunts or challenges another in a manner likely to provoke violent or disorderly response. I think under our harassment statutes, we do have some ability and that that language is also proven in court to have some validity in First Amendment issues, and I guess I would just offer this as an alternative. It does strike Section 3 which is the bubble concept. I know that that is a very important concept from Representative De Gette's perspective, and I would just appreciate some comments on that, Representative De Gette.

DE GETTE: Madam Chair. The "bubble" concept is a very important concept to the Bill because, under current municipal ordinances in many areas they do have harassment statutes. They have noise ordinances, and so on and so forth. It has been difficult for local law enforcement agencies to enforce under some of those statutes because it is a little unclear as to exactly where and when a violation occurs. A lot of it is subjective. We, and, and what you've basically done is take my language from paragraph 2 and attempt to expand it, however, it does get, get rid of the bubble concept which I disagree with, and, also, there's some language in here which comes very close to what I think, I'm just reacting because, of course, this morning is the first I've, but I think it comes very close to a content-based restriction, which, of course, would be unconstitutional under the First Amendment. When you talk in lines 6 through 8 here about "makes physical contact with a person or spits on a person," people would say, I think that protestors might make the argument that you're limiting only certain kinds of activities and not other kinds of activities. The other thing I'd like to point out is I've had some people say to me they're concerned

about the bubble concept, but I haven't, I haven't been presented with any cases where a bubble concept was ruled to be unconstitutional, particularly an 8-foot bubble which I think is not very big, considering how, how, the kinds of bubbles that some of the other locations have up to 60 or 80 feet. And so, given that, my research would indicate that a bubble is in fact more clear and more easy for protestors to understand or law enforcement to enforce and gives everybody more clearly delineated rights, so, you know, I would be happy to take, to take your draft and discuss it with some of the constitutional experts I've been working with, when this goes to the floor, but my gut reaction is it doesn't solve the problem that the bubble concept is designed to solve. I haven't heard any case law indicating that a bubble would be unconstitutional, and you may have some (inaudible) for vagueness and some content-based restrictions that could be a problem.

CHAIR: Thank you, Representative De Gette. I think perhaps one of the reasons that you've not seen citations of cases is that most of the challenges that have been made are to municipal ordinances and have only been at the federal district level. We're still looking, but to my knowledge, none of these have been challenged beyond that level, and, b., in the case of some of them, there have been no challenges to them at all, which is what creates some of the problems with trying to interpret how far you can go and how far you can't go.

DE GETTE: Madam Chair, I want to point out that I have turned up, I have turned up. I agree with you. It's kind of a new concept in constitutional law, and that's part of the reason we don't have a settled body of law on it, but we still do have a number of state court decisions and some federal court, lower district court decisions like the one in the U.S. District Court for the District of Colorado, which seemed to uphold, which

have in fact explicitly upheld the ordinances. I haven't found any that do not uphold it, and that's my only point.

CHAIR: Thank you. Representative Friednash.

FRIEDNASH: Thank you. Is your concern basically with respect to subparagraph 3's constitutionality?

DE GETTE: Representative Friednash, the constitutionality as well as an issue that I will address in a second amendment which is the chilling effect of suits based on the bubble as well. I think that monetary damages from the bubble concept when I have as much reservation about the concept itself gives me even greater heartburn.

FRIEDNASH: (Inaudible.) Madam Chair. Let me point out, too, that, like Representative De Gette, I do have some background in constitutional law, too. I was a former Assistant Attorney General with the State of Colorado. Prosecuted and handled over 100 cases on the appellate level. I've reviewed the case law on this case and, while no case in the Supreme Court is directly interpretive of this type of an issue, some things and guiding principles I think are clear from the litany of cases. First, that the First Amendment is not absolute and that the right to communicate one's view at all times is not always a given in any manner that's desired. There are places where the constitution excepts reasonable time, place and manner restrictions, whereas here, there are alternative channels of communication, such as this bill, the bill deals with the consent. So, whether it's express or implied, where there's consent, there's nothing to stop these people from distributing or communicating their views. Further, there's nothing in this Bill which would restrict the ability to go door to door or to the open market place of ideas to communicate those ideals, and I think that under this provision, they can clearly hand the pamphlet to anyone who wants it. Furthermore, I think the

compelling state interest which the Supreme Court would look at if this Bill, or any other similar Bill, makes it there, and perhaps it will, is the ultimate issue of providing safe access to clinics. And I think based on the testimony today that there's clearly an interest, a compelling state interest for that in this case.

CHAIR: Representative George.

GEORGE: Thank you, Madam Chair. I have a question for our two constitutional lawyers. Let's assume that we're wrong about that and that this becomes law in Colorado, and is accepted and the Supreme Court says that the 8 foot bubble concept is an impemissible restriction, what is left with your Bill? What will the law have left in it to help solve the problem that we've been dealing with?

CHAIR: Representative De Gette.

DE GETTE: With paragraph 2 on page 2, assuming that was only the bubble portion that was overturned, I'm sure it's been your experience as well as mine, Representative George, that we never try to second guess what a court is going to tell us about, about what we're doing, and all we can do is, really do the research and, and give our best educated guess. So, my sense is that we would be left with paragraph 2.

CHAIR: Representative George.

GEORGE: On a little different subject, whether or not this Bill passes, Representative De Gette, tell me what your feeling is about the present application of some of the harassment statutes and some of the menacing statutes dealing with these kinds of problems (inaudible).

CHAIR: Thank you. Representative De Gette.

DE GETTE: Thank you, Madam Chair. The problem with harassment and menacing is, is since the proof, since the proof is on the prosecution and since the standards are not as clear as,

say, the 8-foot limit, it's more difficult both for the protestors to know whether they're breaking the law, and, also, for the people gaining access to press charges, and that's always a very difficult kind of thing in protest-type of situations for them to know. Now, some protestors where they make extremely loud noises, use bullhorns and so on, you heard people testify, have been prosecuted in some municipalities on noise ordinance violations, because, of course, they can take their little machine out and measure the noise, and that's a quantifiable violation. The problem, as I understand it, is there are only a couple of those monitors in the state and so, and, also, not all the localities ordinances like that, and you can't always enforce these kinds of things against the noise ordinances. This just gives a more clear definition to what we're talking about, which I think would help everyone.

CHAIR: Representative Jordan, and then Representative Friednash.

JORDAN: Let's assume this bill becomes law in Colorado, and we're out at the Vine Street Clinic on a particularly difficult day. The number of people composed to (inaudible). How will this bill handle the situation where a person thwarting the clinic setup protest (inaudible) and (inaudible) individuals (inaudible) to (inaudible), of course, after (inaudible). (Inaudible)this one person who (inaudible) sets the other person up to be in violation (inaudible)?

DE GETTE: Well, I have two responses to that. The first one is I think that would be consent on the first person's part, if they're trying to gain access to the clinic and they knowingly go within eight foot of the protestors, I think would be consent. Also, the, the statute is directed towards someone going towards, someone trying to enter a clinic. So, the protestor would not be knowingly approaching the person entering the

clinic. So I don't think you would meet either of those portions of that subsection 3. Secondly, with respect to trying to set someone up for civil liability, I think that's the topic of Amendment 002 that the Chair is offering, and I agreed that I think that that would be an improvement to avoid that kind of a setup for purposes of a civil action. Because for a criminal action, I don't think that would ever be prosecuted because of the "knowingly" element and the "consent" element. The first civil lawsuit, that's a more difficult question because, of course, we don't require a conviction to bring a civil lawsuit, so I've agreed to take care of that problem.

CHAIR: Representative Friednash.

FRIEDNASH: Thank you, Madam Chair. To get back to Representative George's initial question, in my view if the bubble is challenged constitutionally, and the court finds that it is unconstitutional, I think we're left with what is contained in 001, anyway. I think that subsection 2 of 001 is already in the bill first and the crimes of menacing and harassment is still, in my view, prosecutable, so I think you're still left with this in the law. Based upon what we have, there's concern if it is tested constitutionally, at least we've had a ruling on it and know whether or not it's Constitutional and provides more protection and safe access to clinics.

CHAIR: Thank you. Representative Kreutz, you had seconded 001. I would ask your permission to withdraw lines 13 and 14 because they have been separated out to amendment no. 2. So members, if you would just scratch lines 13 and 14 from that amendment. 'Cause I, what I had hoped to do was to allow the committe to deal with these as separate issues, rather than a single issue together. Representative De Gette, and, perhaps, Representative Friednash, because I had written it down as you were talking, the secondary issue on the bubble

concept is who is harmed, the issue of who has an action in connection with the civil liability. Could you explain to me whether or not you believe that the escorts or the clinic operators will have an action, or if you believe that it is simply the individual who is attempting to enter the clinic for services?

DE GETTE: If you look at page 3, lines 12 through 18, what it says is, someone can recover damages or obtain injunctive relief from any person who commits or incites others to commit the offense of preventing passages, or passage. My reading of that and in general of the law is that you only have a cause of action if you've been affected by it and so, anybody who has been barred from passage would have a cause of action. Now, I suppose you could construct a situation where they're barring a health care worker from passage, too, if they' re trying to walk into the clinic. Anyone who's trying to walk into the clinic, and is being barred would have a cause of action. Of course, they'd have to prove all of the elements. But, I think that's important, because these people's safety is important to worry about, too. I will say that I don't think, I know for a fact that the Director of Planned Parenthood or some administrative person or some person or some organization could not sue under this on behalf of people who were being blocked. Only someone who was actually blocked could sue.

CHAIR: In the case of Denver and Boulder, Representative De Gette, how many actions have there been? Have there been misdemeaner charges filed under both municipal ordinances?

DE GETTE: Madam Chair, yes, there have been some filed. I don't know how many there have been. I believe you heard several of the witnesses testify that the effect of the ordinance has been actually what I would hope to have which is everybody knows about it so they stay 8 feet away, and,

therefore, there haven't been as many problems or confrontations as there were in the past. Ruth Hopfenbeck testified about that on Friday, and then Nancy Jenkins and Diane Dillingham testified about that today, so I think in a way what it's done is it's made everybody sort of mind their manners. And, and it hasn't required a lot of charges to be brought.
CHAIR: Thank you. Is there further discussion on 001? I know there is objection so staff please call the role.
STAFF: Representative Benavidez.
BENAVIDEZ: No.
STAFF: Representative De Gette.
DE GETTE: No.
STAFF: Representative (inaudible).
LADY: No.
STAFF: Representative Friednash.
FRIEDNASH: No.
STAFF: Representative George.
GEORGE: No.
STAFF: Representative Kaufman.
KAUFMAN: No.
STAFF: Representative Keller.
KELLER: No.
STAFF: Representative Knox.
KNOX: No.
STAFF: Representative Kreutz.
KREUTZ: No.
STAFF: Representative Morrison.
MORRISON: (Inaudible).
STAFF: Representative Rupert.
RUPERT: No.
STAFF: Representative Tucker:
CHAIR: He is excused.

STAFF: Representative Adkins.
ADKINS: Yes.
CHAIR: That amendment failed 11 to 1. I would move 002. Is there a second?
FLEMING: Finish it.
CHAIR: Seconded by Representative Fleming. Committee, this is the issue that, um, I had pointed out earlier. I think that in the sense of trying to allow civil damages that, the bubble concept gives me more problems than the civil damages from the Class 3 misdemeanor, although I'm not certain that we would not have been better off to just allow injunctive relief and leave it at that, but this amendment strikes the reference to paragraph 3 as an element of the civil damages section on page 3, line 18. So, if you just go to page 3, line 18, it simply leaves parens 2 and strikes parens 3.
DE GETTE: Madam Chair.
CHAIR: Representative De Gette.
DE GETTE: As I said before, I think this is a good amendment. I have no objection.
GEORGE: Madam Chair.
CHAIR: Representative Kaufman, er, George. I'm sorry.
GEORGE: Would someone clarify for me how, on page 3, lines 4, 5, 6 and 7, which is subparagraph 6 and provides for civil liability in addition to criminal penalties, relates to the remedy you are seeking with your amendment which also deals with civil liability or civil damages?
CHAIR: Representative De Gette.
DE GETTE: Representative George, it made sense to me at the time the Bill was drafted. I'd have to look at that to see exactly what that section is. If we need to conform that to make it conform with the amendment, we should do that.

DE GETTE: Representative George, I believe the answer to that question is that it is simply the language from a construction standpoint on lines 4 through 7 is simply referring to the cause of action that is created in 13-21-106, which starts on line 11, and that it does, it is not a conflict to remove the portion relating to para 3, that that does indeed strike a cause of action for that section. Staff has pointed out to me that there is a possibility that we may need to address at a later date if the bill proceeds, the language engaging in prohib ted activity near a healthcare facility on lines 16 and 17 in some other manner, but at this point, I will not be offering an amendment to do that.
CHAIR: Is there objection to 002? If not, staff will please record a unanimous vote. Are there further amendments to House Bill 1209? If not, House Bill 1209 is on the table for action. There is a statement of no fiscal impact. If it is the committee's wish, there is an appropriate motion to the committee of the whole.
KREUTZ: I second that.
CHAIR: Is there a motion?
KREUTZ: I move to send this bill to the committee as a whole.
CHAIR: Representative Kreutz, and seconded by Representative (inaudible). Is there further discussion? Would staff please call the role.
STAFF: Representative Benavides.
BENAVIDES: Here.
STAFF: Representative De Gette.
DE GETTE: Here.
STAFF: Representative Fleming.
FLEMING: Yes.
STAFF: Representative Friednash.
FRIEDNASH: Yes.

STAFF: Representative George.
GEORGE: Yes.
STAFF: Representative Kaufman.
KAUFMAN: Yes.
STAFF: Representative Keller.
KELLER: Yes.
STAFF: Representative Knox.
KNOX: Yes.
STAFF: Representative Kreutz.
KREUTZ: Yes.
STAFF: Representative Morrison.
MORRISON: Yes.
STAFF: Representative Rupert.
HOOPER: Aye.
STAFF: Representative Harper is excused. Representative Adkins.
ADKINS: Representative De Gette, I yes, but with the caveat that I intend to continue working on this Bill. I still am looking for further information on Section 3, and I think that I know you've attempted to balance here, but I'm not convinced it's as balanced as what it could be. Thank you.
DE GETTE: Madam Chair, I look forward to working with you on that, too.
CHAIR: House Bill 1209 passes the committee (inaudible)of the whole 12 (inaudible). The hearing is complete. Committee, we will take a brief three-minute recess while we get Representative Romero from upstairs and then proceed with that bill.

- - - End of Committe Testimony - - -

House Floor Debate

STAFF: (Inaudible) concerning the protection of a person's access to healthcare facilities.

CHAIR: Representative De Gette.
DE GETTE: Thank you, Madam Chair. I move House Bill 1209 and the committee report.
CHAIR: Would you move the report separately, please?
DE GETTE: I'll move the committee report at this time.
CHAIR: Continue.
DE GETTE: Thank you. Um, probably, what the committee, what the committee report did is, as you know, this Bill is concerning the protection of people's access to healthcare facilities. The first part of the Bill establishes criminal liability if someone violates the provisions of the Bill which I'll talk about when we get to the Bill. Section 2 on page 3 of the Bill provides for civil liability for violation of this statute, and, in committee, we discussed the issue of whether it would be appropriate to have civil liability for the, for what I'm calling the "bubble" portion of the Bill, the portion which prohibits people from coming within 8 feet of someone gaining access to a clinic unless they consent, and we agreed that it would be more appropriate for the civil liability to simply attach to paragraph 2 on page 2 rather than paragraph 3, so the committee report simply takes out the civil liability for the bubble portion of the Bill. The criminal liability, which is in the Bill, remains, and I would urge your adoption of the committee report.
CHAIR: Is there discussion to the committee report? If not, that is the question. All those in favor, oh, Representative Jerke to the committee report.
JERKE: Thank you, Madam Chairman. At this time, I want to move the first and only Jerke amendment to the judiciary committee report. Members, what this does is on page 2 of the Bill strikes paragraph number 3. This is the portion that deals with, I guess, the bubble, the 8-foot section, and my reason for

doing it is because other than that I think you got a pretty good bill. In other words, the portion that deals with paragraph 2, knowingly obstructing, detaining, hindering, impeding, blocking another persons' entry, I think that makes good sense. I think that ought to be against the law. I think it ought to be a misdemeanor. But I don't think that the other portion in paragraph 3 which gives people this invisible 8-foot bubble out there I guess makes any sense from the point of view of enforceability and, of course, once again, that great constitutional question. I don't want to bother getting into that argument, this afternoon. We' ve already had great constitutional arguments. This is another great one on First Amendment. She can probably outargue me, the Bill's sponsor. She understands the Constitution far better. Everybody understands that there are undoubtedly questions as to the validity of that. What I am going to point out, though, is that if we take that portion out, we've still got a pretty good bill, I think, at that point, and one that I will support if it does not have paragraph 3 in it. And, again, what that does, is takes out the 8-foot portion the idea to it that people would still have the ability to do all their First Amendment rights, giving somebody a leaflet, perhaps talking to someone. I think we probably have already some laws on the books dealing with harassment and that type of thing, but at this point, I renew my motion and I would urge your support on it.
CHAIR: Discussion to the Jerke Amendment. Representative De Gette.
DE GETTE: Thank you, Madam Chair. Probably, Section 3 on page 2, the "bubble" portion of the Bill, is the core of the Bill, and I would urge you a "no" vote on the Jerke Amendment. It is clear that an 8-foot bubble around people entering a health clinic is constitutional. I've practiced

constitutional law for 10 years. I've researched it, and I believe it's constitutional. Furthermore, the Bar Association has researched this. They believe it's constitutional. The Boulder ordinance, which has been upheld in the U.S. District Court for the District of Colorado, they've said it's constitutional. You've gotten some information today that says that bubbles even bigger than this one, in other words restricting people to come from, coming from even farther away, are constitutional, and I think it's just clear that it's constitutional. The reason it is so important to have an 8-foot buffer zone is if you look at paragraph 2 which simply says it is a misdemeaner to knowingly obstruct, detain, hinder, impede or block another person's entry, is what happens is, particularly with respect to family planning clinics, but, also, in other kinds of healthcare situations, protestors come right up to patients, and we heard some compelling testimony about this in the committee. They yell at them. They taunt them. They commit slurs. They shove dead cats in their faces. They show terrible placards. These are people, many of whom are making very, very sensitive health decisions, and many of them who are simply seeking medical treatment which could potentially be lifesaving, such as cancer treatment or routine medical examinations. Handicapped people have been harassed in this way. What, what various municipalities have found is that when they do not have a bubble-type law on the books, a law that is contemplated in paragraph 2, begins to solve the problem but it does not fully solve the problem because it does not keep people from going right up into the face of patients and I think, and I know many of you share my concern, that it is critical for us to protect the access of patients going into healthcare facilities, no matter what they're going into those facilities for. So, for that reason, I would urge a no vote on the Jerke Amendment.

CHAIR: I would ask the committee not to discuss whether it is constitutional or not. We could debate that all day, because we all are of different opinions, but let's get to the issue. Representative Kreutz.

KREUTZ: Thank you, Madam Chairman. This Bill is not about choice, and it's not about pro-life. This Bill is a "get out of my face" bill, and when I was - I'm not gonna say how old - but when in 1968 when I had a Nixon button on - and I did wear a Nixon button in 1968 - I had people come at me, rush at me, spit at me, throw things at me, and back then, I thought, you know, I believe in freedom of speech, but I don't believe in this kind of thing, and what I would like to do is take this as a first step and next year come back and keep the KKK out of my face and keep a lot of people, you know, just give everybody space. We all need it.

CHAIR: Is there further discussion on the Jerke Amendment? Representative Clark.

CLARK: Yes. I have to speak out in support of this amendment because I think what we're doing here is we're trying to either really address the issue of free speech. I think we're putting a prior restraint on free speech by taking this approach. I think we have adequate law currently to address the situation and we do have a constitutional clause which says no special law shall be enacted where a general law can be made applicable to the situation.

CHAIR: Representative Keller.

KELLER: Thank you, Madam Chair. Well, I would ask a no vote on the Jerke Amendment. This is not a matter of free speech. This is abuse. This is verbal abuse. This legislation wouldn't even be before us, today, if there had been respect from one person to another. We're talking about verbal abuse and verbal harassment, and I am in support of the Bill, and I am

opposed to the Jerke Amendment, and I would ask that you be, too.

CHAIR: Representative Fleming.

FLEMING: Against (inaudible).

FLEMING: Thank you, Madam Chairman. I, too, would ask for a no vote. In committee, as Representative De Gette told you, we heard a lot of testimony from different people saying, I've frequented a lot of these clinics, but I don't frequent them for the sake of an abortion. I frequent them to have a gyn exam, have a pap smear done, to be treated for cancer treatments and what have you. We also heard much testimony, especially from Planned Parenthood, that stated that only 7%, 7% of the people who frequent their clinics are there for an abortion. So we have this 93% of other people in this category out there that are going in for other types of healthcare services. And I'll tell you I'm one of those 93% out there, and I utilize their clinics for my annual pap test every year, and I do that because I get good service, and I also utilize it for another reason, because this is my place of employment and my salary is so generous out there that I can't afford to go to the private physician. What I can afford is the services of a planned parenthood clinic to provide me that annual healthcare exams that we, as women, all need in our society, that can prevent us from some very serious illnesses later on, and I have frequented these facilities and had these people in my face screaming all sorts of atrocities at me when I'm there just to practice good health care practices to secure that my life will be a long and healthy one, and I would submit to you, folks, that I don' t wish to be further harassed in this fashion, and neither do the other 93% of folks out there that are freguenting these clinics, and so I, I would agree with the statements of Representative Kreutz. I don' t want these people in my face, and I have a right to a

certain amount of private space. Please vote no on the Jerke Amendment.

CHAIR: Further discussion. Representative Clark, then Pfiffner.

CLARK: Thank you, Madam Chair. If you'll read carefully section of this Amendment speaks to this 13 and 20. If those are left in, it becomes a misdemeanor to pass out pizza coupons in front of Denver General Hospital. Ah, I think we're taking an approach here that is improper. I urge you to support this amendment.

CHAIR: Representative Pfiffner.

PFIFFNFR: At this moment, I don't know how I'm gonna vote, but I'm, I wanna ask this membership to consider what we're hearing, and that is if that if you don't like the content of the speech, that's a reason to be against having them speak it, but that's the whole issue behind the First Amendment, and keeping all kinds of speech available. Spitting in someone's face is assault, but telling somebody something they don't wanna hear isn't a reason to shut those people up. Still I don't know how I'm gonna vote on this, but let's not decide what content is proper. When people speak it.

CHAIR: Representative De Gette.

DE GETTE: I'll just sum up on this amendment. We're not telling people what they can say. They can say anything that, that they want.

And we're not preventing them from talking to anyone. In fact, they can do it from 8 feet away.

The 8-foot limit was designed so that someone could clearly communicate, and, also, if you look at page 2, paragraph 3, it provides that someone can consent to have the person come closer to talk to them more closely or to hand them a pamphlet or whatever. We believe that it is constitutional and it is essen-

tial. Kindergarten teachers pull kids apart when they begin to have fights, and we think it's appropriate to do in this situation as well. I'd ask for a division.

CHAIR: Representative Jerke.

JERKE: Thank you, Mr. Chair, Madam Chairman. I'm going to ask for an "aye" vote on it. I, I sincerely believe that this is the part of the Bill that may be unconstitutional. I know we're not supposed to address constitutionality, but that probably in and of itself is unconstitutional to suggest that we can't address the Constitution.

But, anyway, that point, I urge an "aye" vote on this amendment. I think you've got some enforcement potential, obviously the constitutional problem. I don' t know whose gonna carry the tape measure out there. I think we already have lots of laws on the books regarding harassment, regarding assault. I find what people do at these clinics reprehensible as well, but we do have a stronger calling out there, and that's the Constitution, and it's also the enforceability ability out there of our laws, and I don't think this is gonna be enforceable, so I urge an "aye" vote.

CHAIR: Representative Jerke, I wasn' t asking, saying that you couldn't mention the Constitution. I just don't want to be debating it back and forth. Representative Chlouber.

CHLOUBER: Thank you, Madam Chairman. Representative Jerke, I'm with you. I don't want to debate the Constitution. It's not a constitutional issue between us, but it is a common sense question between us, and I realize that's not a criteria mandated on this body, but all we're saying in here, in paren 3 of this Bill, is "stay back 8 feet." I don't care what side you're on. If you're pro or con, stay back 8 feet. And that gives everybody their right to speak their piece. You can say what you want to 'em. Either side of the question just gives us 8 foot, and you know

that certainly isn't happening. This addresses that problem. that is a very, very real problem. So, I'm gonna ask the defeat of the motion of Representative Jerke and that we support this Bill. Thank you.

CHAIR: Representative Clark.

CLARK: Thank you Madam Chair. Again, briefly. If you read the way it is written, no person shall approach another person within eight feet of that person, et cetera. If you're simply passing someone on the sidewalk and you happen to be wearing some kind of a campaign sticker or button that they don't like, you are in violation of this, and guilty of a misdemeanor. I think we've created a situation that is indeed going to be unenforceable and I ask for a yes vote on this amendment.

CHAIR: Representative Chlouber.

CHLOUBER: Representative Clark, the only reason you would want this out of there, if you wanna get in my face closer than 8 foot and argue your case, that is the only reason you wouldn't want this in the Bill. Now, I don't want people coming up to me with their protests, with their whatever, and telling me or anybody else in the state of Colorado what they should or should not do, their particular values. Just stay back 8 foot. You know that's happening, particularly at the clinics that are in question, here. This solves that problem.

CHAIR: Further discussion. Representative Kaufman.

KAUFMAN: Thank you, Madam Chairman. I must disagree with Representative Clark. This deals with access to medical clinics. If you have a campaign button on like you're supporting a candidate for office, and you're walking down the street, this has no application to That, and, it's limited, again, to access to medical clinics, and I'd just like to also state we have already two statutes in place in this state that regulate

obstructing people's going into places. One is 18-9-107, obstructing a highway or other passageway, and the second one is 18-9-109, which is interference with staff, faculty or students of an educational institution. That was passed during the Viet Nam war, and I' m sure it had to do with the riots and people blocking off buildings and such, and you can't do that on a campus here, in the State of Colorado. I'm going to vote no on the amendment. Thank you.

CHAIR: Further discussion on the Jerke Amendment. That is the question, the adoption of the Jerke Amendment, and there has been request for a division. Would all those in the chamher not eligible, not entitled, to vote please sit down. Those in favor of the Jerke Amendment, please stand, remain standing. Please sit down.

Those opposed. The Chair is not in doubt.

The Amendment fails. Representative De Gette.

DE GETTE: I would just move the committee report.

CHAIR: We need to adopt the committee report. Is there any objection to the committee report? To the committee report. Representative Duke.

DUKE: Thank you, Madam Chairman. At this time, I would move, dot one, as a substitute to the judiciary committee report.

CHAIR: Continue.

DUKE: If I might continue, Madam Chairman. We have been talking about the constitutionality of this. Believe me, Representative De Gette, I really understand the kind of frustration some of the people who are motivating your law must feel. I feel many of the same frustrations when other classes of people are in my face, such as the homosexuals, as they frequently do. I feel the same disgust for that. And I feel the same need for protection from that. But I don' t want to live where we start excluding specific classes of people from this.

Yolanda, I've asked you to that show one handout, a handout. This phrase, I think, sums it up pretty clearly. The General Assembly shall not pass local or special laws in any of the following enumerated cases: granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise, whatever. This doesn't say, "unless they're entering a healthcare clinic." This doesn't say, "unless they're going in for an abortion." This doesn't say, "unless they're going in for a gyn examination." What it says is "you may not grant a class of people, a single class, special privilege." And you might say, "What does this really mean? How is the court going to interpret this when they get it before them, because the Bill is clearly unconstitutional." If you look in the detail under Article 5, Section 25, when is class legislation prohibited? Dunbar v. Hoffman. when the effect of the law is to prohibit the carrying on of a legitimate business or occupation while allowing other businesses or occupations not reasonably distinguished from those prohibited to be carried on freely. This Bill does that. That's when class legislation is prohibited. We've heard references to Boulder and Denver. Why is it okay for Boulder and Denver to do this, but not the State? Does that seem unusual to people? It does to me. If you look a little further, special legislation is not forbidden in respect to incorporated cities or towns. A court ruling on this: Mayor of Valverde v. Shack. On this very legislation. You cannot prohibit it for cities and towns. The one that is prohibited from passing this is the State. We can't do it. Boulder can do it. Denver can do it. Colorado Springs can do it. It's the State that cannot do it. We already have case history on that. A further case on this particular statute, statutes which prescribe different punishments for the same violations committed under the same circumstances in like situations are

void as violative of the equal protection of the laws. Vanderhoof v. People. This Bill provides for much more criminal offenses for a very select single class of people. We look further under the test, the court case for that particular statute. A test of a special legislation - when is it special? when an enumerated prohibition is indicated if the legislative classification of a real or potential class or is it logically or factually limited to a class of one? Absolutely. This Bill applies to a single individual. You can't do this. The courts have already ruled. We don't have to wait for a test case on this. When does it not violate this section of the Constitution? When the statute creates several classes of potential beneficiaries. And more than one entity could be so classified over an extended period of time. Not only does this Bill fall within the span of Article 5, Section 25, but the test cases throughout the courts have supported that particular portion of this Constitution. And, I further remind you, we all swore an oath, every one of us, to uphold that Constitution. You cannot do both. You cannot vote for this Bill and maintain your oath to the people of Colorado because not only the Constitution is prohibiting it, but the test cases on that particular statute are prohibiting it. I encourage adoption of the amendment.

CHAIR: Representative Kaufman.

KAUFMAN: Thank you, Madam Chairman. I'd have to disagree with my colleague on his reading of the Constitution. If you will read, follow what's up on the screen, there. It says the General Assembly shall not pass local or special laws in any of the following enumerated cases: granting to any corporation, association, or individual. This is not a law granting any, it's not a local or special law granting anything to a corporation, association or individual. This is a law that protects every citizen in the State of Colorado, all of us, so it's not to any

particular individual, and it's not a special exclusive privilege, immunity, or franchise. The only thing it could possibly come under would be privilege, and we're not talking about a privilege. We're talking about a right, a right to free access, to medical care, without being harassed. So the Constitution of the State of Colorado does not prohibit this Bill. Thank you.

CHAIR: Representative De Gette.

DE GETTE: Thank you, Madam Chair. This the kind of stuff lawyers love. I have a memo which I did not pass out to everybody because I wanted to be in the spirit of Representative Gordon's bill. Since I am an attorney I didn't want to waste a lot of paper. But basically the Colorado Bar Association, Bill of Rights Committee, as well as Dean Nichol of the Colorado Law School, both have opined that this kind of time, place and manner restriction is constitutional for the reasons Representative Kaufman just talked about, this article of the Constitution doesn't really apply to what we're talking about here, which is the rights of everyone. Furthermore, there is a Colorado Supreme Court case under this article, which has upheld time, place and manner restrictions of this type.

I have challenged the opponents of this Bill, time and time again, to show me any place in the country where a bubble bill of this nature has been held to be unconstitutional as a violation of the First Amendment. There aren't any. Instead, as I said, the Boulder ordinance on which this statute is modelled has been upheld in the federal court in Colorado, and, if you look at the memo that you received earlier today, a number of much broader restrictions have been upheld in the courts. Basically, the constitutional argument is an excuse to kill the Bill by people who think it's appropriate to get into people's faces. The Bill is constitutional. It's an important public right of access to

health clinics, and I would urge, again, a no vote on this amendment and, again, I would ask for a division.

CHAIR: Representative Duke, and then Clark.

DUKE: Well, I guess unfortunately I simply disagree. This Bill is not for everyone. That's the problem. It's not for everyone. It's for people who are entering these healthcare facilities, primarily for an abortion. That's what it's for. It doesn't apply to me. It doesn't keep a circle of freedom around me when, when we have homosexuals stand right in our face in the basement of this Capitol, as they have done. It doesn't keep an 8-foot bubble around my car when that happens. That's the problem with this Bill. If it were broad enough to allow that kind of individual freedom, that would be great. That would be wonderful if that's what it said. That's not what it says. This singles out a very specific class of people and gives them a special privilege that is not shared by the remainder of society. Those ordinances that Representative Kaufman told you about, he left out one very important detail, and that is that they're general in nature and apply to everyone, not a single class of people. And I ask you this. Suppose the Bill is in place and suppose that person walks up and that person violates the 8-foot bubble. Is it all right, then? This Bill is not well written. I really empathize with what she's trying to do. I can understand the frustration that that must be. But this is not the way to do it. Write a bill that does this for everyone, and I'll support it. I encourage adoption of the amendment.

CHAIR: Representative Clark.

CLARK: Thank you, Madam Chair. I think there are four points I'd like to make in support of this amendment. Number one, this Bill really does constitute no less than a prior restraint on free speech. We already have adequate laws on the books to deal with trespass, harassment, blockades and vandalism.

Item number three, this unfortunately applies to all forms of speech as Representative Duke pointed out. Again, if you were simply walking by a hospital or a healthcare facility and you happened to have some kind of a political sticker or slogan on, that is offensive to someone, you're committing a misdemeanor, simply by expressing your free speech, simply by walking down the sidewalk in front of a healthcare facility. Unfortunately, this bill is written so broadly that it could also apply to leafletting activities. For instance, if nurses were on strike outside a hospital, this could well apply to them. Again, I agree, with Representative Duke, this is not the way to deal with the problem, and urge support of the amendment.

CHAIR: Is there further discussion on the Duke Amendment? There has been a division requested. Anyone not entitled to vote, please sit down. All those in favor of the Duke Amendment, please rise and remain standing for the count to be taken.

Please sit down. Those opposed, please rise.

The Chair is not in doubt. The Duke amendment fails.

To the Committee Amendment as amended. Representative De Gette, did you have anything else to say about that?

DE GETTE: No, Madam Chair. I'll move the committee amendment, or committee report and ask for an aye vote.

CHAIR: We did' t amend it. I'm sorry. We didn't amend it. It's been so long. The Judiciary Committee Amendment is the question. All those in favor, please say "aye."

LOTS OF PEOPLE SAYING "AYE."

Those opposed, no.

The Amendment passes to the Bill as amended.

DE GETTE: Thank you, Madam Chair. I think we've had a lengthy debate. Everybody knows my position on this. It's a

matter of human decency, and I would just ask for an "aye" vote on the Bill.

CHAIR: Is there further discussion? Representative Duke.

DUKE: Well, obviously, I'm gonna ask for a "no" vote. I wish I could take credit for the following phrase, but it comes to mind when we consider issues like this. It was mentioned by a former legislator, standing in these chambers. "We killed 'em before they are born. We killed 'em when they are infirmed. We killed 'em when they are old. My God, what kind of place is this?" I encourage a "no" vote.

CHAIR: Is there further discussion? There has been a division requested. The question is the adoption of House Bill 1209 as amended. All those in the chambers not entitled to vote, please sit down. All those in favor of House Bill 1209 as amended, please rise and remain standing.

There is not a doubt. The Bill passes.

Senate Committee hearing on 3/3/93.

In attendance:

Cassidy
Groff
Hopper
Lacy
Mutzebaugh
Pastore
Ruddick
Blickensderfer
Wham - Chairman
Senator Feeley, Sponsor

CHAIR: Senator Feeley will describe the bill and the committee has a chance to ask questions. We have five persons who will testify for the bill. I will then take five against and we will then, if there is time to hear everyone in some detail we

will. Otherwise we will ask you to make a (inaudible). Senator Feeley, tell us about House Bill 1209.

FEELEY: Thank you, Madam Chair, members of the committee. I'm here today to present to you House Bill 1209. This is a bill which has generated a great deal of interest, but, actually, not a lot of controversy. I think that when you read the Bill and when you hear the witnesses, you'll realize that this is a Bill that is actually very limited in scope. This is not a bill about abortion. This is not a bill about inf ringing on First Amendment rights of any individual. This Bill involves walking up a sidewalk to a healthcare facility and involves a matter of common courtesy. The purpose of the Bill is expressed very well in the intent, and that's to insure that citizens have access to healthcare facilities in order to obtain medical counselling and treatment. The Bill is actually based on two ordinances which are in effect today, one in the City and County of Denver and one in the City of Boulder. Both of those ordinances have been in place for quite a period of time, and both of them have had a what I feel is a very good effect. They've gone a long way to alleviate instances of violence, instances of violence and unpleasant instances when one is seeking access to a healthcare facility for medical counselling or treatment. The Bill's, the Bill's an attempt to avoid confrontations, and the Bill strikes a very delicate balance. The Bill was drafted very carefully to preserve the rights of an individual to exercise their First Amendment rights and preserve the rights of the individuals to obtain medical counselling and treatment. The witnesses will testify about the need for this legislation and the types of confrontations that have occurred in the past and types of confrontations that this Bill is designed to address. One of the witnesses from Planned Parenthood, Mr. Gary Jamieson, will talk about confusion that

results off and on the sidewalk outside of a healthcare facility. I'm sure Mr. Jamieson will testify that of the services provided by Planned Parenthood in the State of Colorado, only 7% of those services involve abortion services. Most of the patients of Planned Parenthood facilities are there for other services - to obtain pap smears, cancer screening or birth control counselling. The purpose of this Bill is to try and make, to try and enact some common courtesy in order that both parties can be protected. As to the Bill itself, the Bill is really divided into two parts. Section 1 of the Bill, which has 2 subparts, creates, declares that a person commits a Class 3 misdemeanor if they knowingly, if they knowingly obstruct, detain, hinder or impede another person's access to a healthcare facility. Well, I'm sure this committee knows for a Class 3 misdemeanor, the maximum penalty would be a six-month sentence and a $750 fine. That's the maximum. That's not the likely, that's the maximum. The second part of Section 1 deals with what we refer to as the "bubble." This means that a person commits a Class 3 misdemeanor if, within 100 feet of the front door of a healthcare facility, they approach a person entering that facility knowingly with the intent to hinder or delay that entry into the healthcare facility. The most important part of the Bill is contained in this section, I believe, and there is some safeguards written in there. One does not, does not commit, is not guilty of a misdemeanor if the person approaching the facility gives their consent. Now, consent can be given in a number of ways. If someone approaching the facility reaches out to take a handbill from a sidewalk protestor, that's consent. If someone says, "Yes, I'd like to hear more about your position," or "I'd like to receive some education about what services are provided inside that facility," that's consent. If someone says, "I'd like to read your sign," or "I'd like to read

your literature," that's consent. And the Bill, in Section 1 - the second part of Section 1 - specifically addresses that consent.

The second part of the Bill, in Section 2, provides a civil remedy. It provides that an individual can seek damages or injunctive relief from a person who violates or who knowingly commits or incites another person to commit the offense of preventing passage to a healthcare facility. Now, Boulder has had a similar ordinance in effect since I believe it was 1986. There are a number of constitutional questions that have arisen, and I'd like to advise the committee that the Boulder ordinance was in fact challenged in the Federal District Court here, in Denver. In 1987, it was determined that the Boulder ordinance which is in fact a little bit more restrictive was held to be constitutional. Representative De Gette, who has worked very hard on this Bill, and I have both looked at the constitutional implications. We have not found a single case from around the country which found a similar bubble-type ordinance to be unconstitutional. On the contrary, we found numerous cases which found bubble ordinances sometimes far more restrictive, to be constitutional. The Supreme Court of the State of Washington found constitutional a 100-foot limit outside of healthcare facilities. There was a court in San Diego that upheld a 60-foot right-of-way which in fact put sidewalk protestors across the street from the healthcare facility. This Bill imposes an 8-foot facility. 8-foot is about the distance, in fact, is just about the distance that I sit from Senator Wham right now, and I think that Senator Wham and I would certainly not be impeded in any discussion that we might want to have, even if this microphone wasn' t here. I think that 8-foot is a very reasonable distance. It prevents a more heated confrontation, yet it preserves the right of the protestor to exercise their First Amendment rights. I believe that this Bill

is very narrow and really deals with an issue of common courtesy. I hope you'll support the Bill. I'll be happy to answer any questions you might have.

CHAIR: Questions from the committee. Thank you. Then, we will call Gary Jamieson. Would you identify yourself, please?

JAMIESON: My name is Gary Jamieson. I'm the Associate director for Planned Parenthood of the Rocky Mountains. I'd like to thank you for allowing me to speak. I've been with Planned Parenthood for 19 years, and I oversee, among other things, the accounting department, the support activities for Planned Parenthood.

CHAIR: Would you pull the mike closer a little bit.

JAMIESON: In addition to the accounting and other responsibilities that I have, I am responsible for clinic security and facility security for our organization. Planned Parenthood of the Rocky Mountains supports House Bill 1209 for the 60,000 patients that we see every year. As referred to earlier, only 7% of those patients are abortion patients. 93% of the patients that come into our office are there for some other reason, reproductive health care, counselling areas or other services. In fact, we're working very hard to expand the breadth of services that we're providing. Most of those clinics have had picketing at one time or another and most of those clinics have patients that could tell you stories about what kinds of services are provided there and what kind of protests they've come up against. People protesting outside and, for that matter, the general public can't tell what reason someone's going into a clinic. I've personally seen the protestors from both sides of the fence. I've been to the Vine Street Clinic on many, many Saturdays over a period of years, and I can tell you that their sidewalk counselling is not designed or doesn't appear to be de-

signed, anyway, to enlighten someone. It seems to be more to intimidate and it is a very imposing experience to come up against that group, particularly if you're feeling at all uncomfortable about what service you're going in for. If you're at all uneasy about what you're going into a clinic for or for that matter if you just don't know what's going on and you see a bunch of people on the sidewalk yelling and shouting and so forth, it's not going to make for a pleasant experience. We think that 8 feet is a reasonable distance, it's roughly two arms' length away, and in conversations with strangers in public areas, it's just about the distance that you'd be comfortable standing at. The protestors are going to try to say that they are merely sidewalk counsellors helping troubled young women make up their minds. would encourage all of you to go see what that's like in person. We've considered it to be one of the catalyzing experiences for our staff to come into a clinic being protested and just see what it feels like. I can tell you that, from personal experience, it's one of those things that makes you believe even more strongly in the work that we dod. I can also tell you that it is the kind of thing where there's a little infant between you and the protestor, it tends to deescalate the confrontation and, frankly, that's what we're after. The posture in places without this kind of ordinance is for the protestors to get in your way, or do in-your-face protesting and in the Denver clinic, where this ordinance has gone into effect, it had the, a definite deescalation of tension, which is what we're after, so, I guess, in the end, what I'd like you to do is support 1209 and if I can answer any specific questions, I'd be happy to.

CHAIR: Questions for the witness. Thank you very much, Gary. Sandy Curry. Identify yourself for the tape, please.

CURRY: I'm Sandra Curry. I'm Director of the Grand Junction Women's Clinic. I have been the Director of the clinic

for the last three years and have been employed at that clinic for more than seven years, now. I'm very much in favor of this Bill being enacted to provide a buffer zone for people when they come in. Among some of the experiences that I've seen at our clinic where we haven't had the strong violent threat. A lot of it is a very subtle kind of cruelty, in fact. For instance, a nurse who was at my clinic once upon a time, she was at my clinic and just recently employed, as she drove away on her first day there, a picketer leaned into her car as she had (inaudible) to slow and to go onto the street and called her a baby-killing bitch. That's not something that, even though she worked there or what the circumstances were. I can only conclude that this is the kind of action any woman who's there goes through. Without a doubt, as do most clinics, we provide low-cost care for many things, pap smears. We've been the only clinic in the State of Colorado until recently that offered depoprovera. We had a great many people who come to our clinic for that service and, without a doubt, the picketers had no reason to know what was going on. And some of the other circumstances where I've known picketers misjudged why a woman was there and I felt a really strong, powerful agony for the woman involved was a woman that had a child that she was carrying and was a wanted child die in the womb. She was coming to our clinic to have the dead fetus removed, and the picketers stood outside and called her "murderer" and names and didn' t even give her the privacy to reach a clinic and find good medical help in a way that made her safe. These people should not be allowed to do these kinds of things for any reason. Thank you.

CHAIR: Thank you very much. Ruth Hopfenbeck.

HOPFENBECK: Thank you. My name is Ruth Hopfenbeck. I am a volunteer for Planned Parenthood of the Rocky Mountains. I am an escort at the Vine Street Clinic on

Wednesday mornings from 7:30 to 9:00. I am also a member of the Board of Trustees of Planned Parenthood of the Rocky Mountains. I have been an escort for over three years, and I'm here today to give you a sense of what happens five days a week at the Vine Street Clinic. I will also give you two examples of where I personally have benefited or have been involved when a patient has benefitted by the bubble ordinance since it's taken effect in Denver. Five days a week, at the Vine Street Clinic, at least five, a minimum of five, and more like 12, 13 to 15 protestors are walking up and down the street. One of the first things a patient sees when they arrive is a large sign saying, "This is the killing place." The protestors are walking with their bloody fetus signs, walking slowly across the driveway as cars approach and making it not as easy as it could be to have access to our parking lot. I'd like to say that we are very fortunate at the Vine Street Clinic because we do own the space south of our clinic where the patients are urged to drive in and park. We also are separated from the sidewalk by a low wall and this makes our situation far better than that of clinics throughout the State of Colorado. One, the first, what patients are hearing as they enter are, the people are calling them murderers. They're calling us murderers, killers. They accused me of murdering my children. They call the situation a holocaust situation. They call those of us who escort guards from Dachau. But our role is to get the patients in as quickly as possible. We ignore the protestors and I think handle the job quite well. In one instance that occurred, one of the patients parked her car - in this case, it was a truck - on the street, rather than coming into the parking lot. Patients are told to come into the parking lot as a matter of safety and ease of access to the clinic, but they often don't hear. They don't, as you all know, if you're listening to your doctor or you're in a crisis situation,

you often don't hear all the instructions. I was asked, after the patient entered the clinic, if I would mind bringing her car in. I went out with another escort. I had difficulty starting the car, the truck. Within moments, the protestors were all surrounding us and the vehicle, slapping signs against the window shield, and I was able to say, "Eight feet back, please." And they obliged. I then moved the car, which was even more difficult than starting it, and finally, after much effort, I couldn't even get it into the lot, but parked it on the sidewalks again, and we were again surrounded. We couldn't get out of the vehicle because it didn't open from the inside. The doors didn't open from the inside. And, again, they surrounded us, but we were able to ask them to move back eight feet, even though they taunted us and said, "You have no idea what eight feet means." Another instance, a patient and her mother entered the clinic from a gate on the east side of the property. Again, they were confused. They did not bring their car into the parking lot. Immediately, they were surrounded by the protestors, signs in their face, taunts, yelling. The gate stuck, which prolonged the moment. We, the escorts, moved to her as quickly as we could and asked the protestors to please stand back eight feet. They did, and we got her in. As we got into the vestibule, the mother of the patient turned to me and said, "I cannot believe this. My daughter was raped." These are just some of the things that we are faced with. I urge your support of 1209.

CHAIR: Any questions? Senator Feeley.

MAN: Thank you. Mrs. Hopfenbeck, you mentioned in your testimony that there was talk about. not knowing what 8 feet is. Protestors didn't know what 8 feet is?

HOPFENBECK: I think they do. Yes, I think they, they know what eight feet is, that they do, you know, they're taunting us, about a lot of things. Thank you.

CHAIR: He was here. Thank you. I don't see Mark. Oh, there you are! Mark Simon.

SIMON: Madam Chairman, members of the committee. Thanks for having me here to speak today. I've heard a few people talk about this Bill from the abortion perspective, and I'm sure that everybody else who testifies today will talk about it from that perspective, but I'm not going to. I'm gonna put a different perspective on this Bill. This Biil is supported by the two largest organizations serving people with disabilities in this State, representing about 150,000 people. The disabled community supports this Bill for a coupLe of reasons. First is we have now identified two instances in the nation in the last six months where people, others other than those seeking abortions, were prevented, accosted, etc., while entering a medical treatment facility. The first, I'm sure you'all have heard about, and it's the gentleman in Pittsburgh about a month ago who received a baboon liver transplant who was dying from hepatitis. In his case, they had to give him the baboon liver transplant because if they'd given him a human liver, it would have been eaten up. These don't. In his case, he was beset by animal rights activists. The second incident was about five months ago, in Florida. A gentleman in a wheel chair entering a medical facility down there was beset by anti-Medicaid protestors, of all people. They ended up knocking him out of his wheel chair. The ironic part about it is he wasn't a Medicaid patient. They just perceived he was 'cause he was a wheel chair user. What it brings to light is the fact that as Operation Rescue and those types of organizations gain more publicity and higher profile, others begin to copy their tactics and techniques and that, of course, brings great concern to our community because people with disabilities tend to be targets. We are seen as vulnerable. We are seen as easy to push around.

I, myself, for those of you who don't know on the committee, I was hurt in January of 1985. I had a 27-ton mobile home fall on top of me, breaking my pelvis in 36 places and almost severing me in two at the waist. I've been on the table 35 times since then being pieced back together again. I have received eight experimental procedures, the first of which saved my life, and I'm the first survivor of it. Imagine if at any point in time any of those procedures had been denied to me. I either would have died or the quality of life that I currently live would have been substantially reduced, so that's a great concern to me. What this Bill really does is, is one of the authors of the Americans With Disabilities Act, to steal a phrase that they have used, it "codifies courtesy." That's really what it does. It codifies common human courtesy. You have to weigh First Amendment rights and society's rights against the individual's right to privacy. Most people don't know this about the Roe v. Wade decision. The result of Roe v. Wade was Jane Roe got an abortion. What the Supreme Court decision addressed was an individual's right to make their own medical decisions in privacy without outside influence of others. I, myself, do not personally support the concept of abortion except in the most extreme cases. But I would fight to the death to protect somebody's right to make that decision for themselves, without hesitation. As the great jurist, Judge Learned Hand, once said, "Your right to swing your fist ends where my nose begins." I think that's appropriate here. Does a protestor have the right to force their viewpoint on you by gettin' in your face, screaming at you, shovin' their signs at you or do you have, is your right to ask them to give you your personal space, to stand back and scream versus doing it in your face, is that a greater right? I've been on the table 35 times. I can tell you, it never gets any easier. Every time you have an invasive medical procedure, it's

just as tough as the first time, and the toughest period of time is when you're on your way to that procedure, when they're taking you to the operating room, when you're walking into the clinic, whatever. You don't need additional stressors placed upon you when you are dealing with what for most people is the most stressful time in their entire lives. In closing, the final point that I'd like to make is, this Bill is gonna save us money. I resent the fact that, according to the Denver Police Department's own numbers, every time before the Denver bubble bill was put into place it cost me, the taxpayer, $60,000 every day that Operation Rescue was besieging one of the Denver clinics. This Bill is going to make law enforcement easier. It's gonna reduce the net number of police officers actually required on site to keep those clinics open when these events occur, and it's gonna put money back in the budget which, in light of Amendment One we all know, is real important right now. I think that's all I really have to say. I could go on on this topic for some time, but I won't. The bottom line is, I don't think that this Bill just applies to those seeking abortions or even just seeking services at abortion clinics. Without bills like this, I think we're gonna see this kind of effort grow, increase and spread to other areas, and that's of great concern to me, and we certainly need to discourage that. Thank you.

CHAIR: Thank you. Are there questions? Thank you Mark. Diane Dillingham.

DILLINGHAM: Madam Chairman, members of the committee, my name is Diane Dillingham, and I am District Coordinator for Colorado Republicans for Choice. I'm not here testifying this afternoon in that capacity, however. I was invited to testify because I was a volunteer escort at the Vine Street Clinic in 1988 before Denver had the bubble ordinance. Being an escort in those days was frightening. Let me assure

you we were not afraid of words, we were not afraid of pamphlets, we were not afraid of signs. We were afraid for our physical safety. The goal of the protestors as it always was was to shut down the clinic. Our goal was to preserve the right of the patients to receive legal treatment that they were entitled to. Most Saturdays, we would arrive at the clinic somewhere around 5:00 a.m. If we arrived after that, we were sometimes unable to get inside. Some of the staff and volunteers would actually spend the night at the clinic if they were expecting a large protest that day. The protestors would arrive in caravans, having met at a central location earlier in the morning. We would never know what their target was. We would never know where they were heading until just before they arrived. They were very well organized, and they'd even decided at the meeting prior to their showing up which of their members were to be arrested that day for trespassing. Their first action was always to block the entrance to the driveway to the clinic. This forced the patients to park on the street. Then, as escorts, it was our job to meet the cars and escort the patients into the clinic, sometimes with their friends, sometimes with their families. We were issued special vests that we wore to identify us as clinic volunteers and to differentiate us from the protestors. We would surround the patients and their families and walk them into the clinic, and the people trying to stop their access would surround us. They would push and they would shove. Sometimes, tempers were lost, and they would kick and they would bite, and I came home many days bruised. They would try to physically pull the patient out from within our midst. It was frightening. It was dangerous, both for the escorts, the patients and their families. After all of the patients were into the clinic, then the actual protest would begin. They would climb over the low wall that you've already heard described in

front of the clinic and they'd rush towards us. By this time, the police were there. Many times, they were there on mounted horseback. They used the K-9 corps to turn back the tide of the protestors. Some of the protestors were arrested for trespassing and taken for hooking to the waiting police buses, but only the people who actually crossed over the line onto Planned Parenthood property were the ones that were arrested. The only way that the other people, the ones who had attacked us on the way in, could be prosecuted, were for us to swear out an individual warrant charging them with assault. We were very often encouraged to do that, but when there are two crowds of people, one opposing, one trying to walk the people in, it wasn't as easy to identify exactly who had done what, who had thrown a punch, or who had pinched or who had kicked. It's a very confusing situation. Patients were also encouraged to prosecute people who'd harassed them, but the patients by doing so would have lost their anonymity, and their anonymity is one of the most important things that we try and protect in these kinds of situations. You've heard a lot about the fact that the people opposing the law are merely trying to educate and pass out pamphlets and they're there to be helpful. This rings very hollow to me, because we had as much trouble getting the patients out of the clinic after the treatment as we did getting them in. It was as hard to get them to their cars after they'd been in the clinic for whatever treatment they were there to receive as it was bringing them in. We had the same kind of problems. We had to surround them and help them. We had to protect them. The anti-choice person movement is aware that they are on the losing side of the choice debate. Legally, they've lost the battle. But they are well aware that the legal right to a procedure is very, very different from having access to that procedure. The new tactic is to accept the legality of

abortion but to make this procedure impossible to obtain. I ask you to please support the clinic access law so that all people can have safe access to clinics, free from physical intimidation and harm. Thank you.

CHAIR: Any questions? Thank you. Jeannie Hill.

HILL: Thank you, Madam Chairman, and members of the committee. I would like to pass out some things.

CHAIR: Give them to the (inaudible). Thank you.

HILL: Can I hold this? Three weeks ago, The Denver Post quoted the sponsor of this Bill, Representative De Gette, as saying, and I quote, "Today in Colorado the right to unrestricted healthcare is in jeopardy." Can someone show me the law in Colorado that says anyone has a right to unrestricted healthcare, especially when it is at the expense of other people's freedom? Does an injured patient in the back of an ambulance have an unrestricted right for his driver to ignore stop lights? Or does the driver have to consider protecting the rights of other people before he speeds through the lights? I think we all know that we're talking about abortion here, so let's get to that. Is elective abortion, is elective abortion so important to the State of Colorado that it's going to be singled out and given more privilege than actual medical emergencies? In other words, will the ambulance driver still have to consider other people's rights while those seeking elective abortion will be trained to take away the rights of others, including myself? If this is the case, then Colorado will officially establish that elective abortion is of greater value in this state than freedom of speech in the public arena, verbally or through the passing out of literature. I believe that this law was built on two false premises, number one that healthcare, or in this case abortion, is not currently restricted in Colorado. It is restricted, and it always has been. Call my husband and ask him for an abortion

and he will refuse you. That's a restriction. Call an abortionist and, if you don't have the cash, he will refuse you. That's another restriction. The majority of voters in this state said they will not pay for someone else's abortion. That's another restriction. The number two false premise is that abortion patients in Colorado need more laws than they already have for a speedier access to abortion. Where is the proof or the evidence that the State of Colorado needs another law to protect anyone's access to abortion? The fact is that those seeking abortions have never chosen, never chosen, to my knowledge, to use the existing remedies of law, either disturbing the peace, disorderly conduct, harassment, those sorts of things, to file a grievance. Either they had no grievance, or they chose for themselves not to file one. The fact is that out of approximately 38,000 abortions done by Planned Parenthood since 1985, 38,000, none of these patients have chosen to file any kind of charges against people offering help or literature, and that's probably a drop in the hat compared to the total abortions in this State since 1973. Find a case. The people wanting this law are the abortion providers the and volunteers who have unsuccessfully tried many times to bring charges themselves and intimidate us off the .public sidewalks. In their desperation, and after having failed the court, they now beg the legislature to further their own cause and meet their own selfish needs. Again, they want to make choices for others in order to benefit themselves. Abortion workers know better than anyone else that they will still have the right to grab a woman's arm and lead her toward the abortion while other citizens like myself will be severely restricted and burdened in offering literature to that same woman. Where is the balance here? There is none. Those people working for abortionists know that their stranglehold methods combined with this bubble law will

together virtually guarantee that no one gets to see our literature. Again, where is the woman's choice, and where is the balance? Representative De Gette suggested that the bubble ordinances in Boulder and Denver are working because no one has filed a complaint under these laws. The fact of the matter is that these laws are totally unenforceable. Let's face it, who really wants to carry around an 8-foot yard stick every time they go to the doctor? Secondly, who will ever know about this law. And, thirdly, who in the world is going to believe it? Seriously, the only person I knew who ever used this ordinance was a Planned Parenthood volunteer and she, the case was either dropped or she lost the case. These bubble ordinances have not been used because they are useless. I think it would be appropriate before you pass this obscure law for you to ask Representative De Gette to play out a scene for you and the rest of us, and I'm serious about this. Play out a scene right here to give us a minimum understanding of how we are to behave when a person with a permit to hold our license to freedom of speech decides to withhold our freedoms. We honestly don't know what to do. In reality, what do I have to do in order to avoid going to jail under this law? We may need a weekend seminar to learn where all the public easements are in this State and whether they're different from where the sidewalks exist. We all need to know how this new law would work out in the real world. But if this law, Bill, becomes law, the high cost of abortion will have just gone higher in Colorado. Now, many others, including myself, will have to pay, too, with our First Amendment rights, because Colorado, will be going to establish that elective abortion is of higher value to the state than my freedom of speech, or anyone's freedom of speech. As I understand it, and I' m not an attorney, the standard review involved in federal court constitutional fundamental rights

cases is that of strict scrutiny. This State must prove that the law was necessary to promote a compelling, paramount government interest. If that cannot be proven, this law is constitutional, unconstitutional. So I ask you to consider this one question: How will you prove that this law is in the least necessary to the interests of Colorado's government when you can't find one complaint filed in the courts by a legitimate user of the medical services. Please consider as well what this kind of law will cost the taxpayers of Colorado. I've discussed this matter with attorneys who believe that this Bill poses a substantial threat to both the Colorado and United States Constitutions. I'm advised that if this Bill becomes law, a cause of action will be available to me to challenge the constitutionality of this law, and, like Roe v. Wade, I don't need a denial of my rights to challenge this law because the law itself will be a threat to me every time I go out on a public sidewalk within 100 feet of a medical facility. Thank you.

CHAIR: Are there questions? Senator Ruddick. Thank you Madam Chair, members of the committee.

CHAIR: (Inaudible).

RUDDICK: (Inaudible.)

HILL: If an officer believes that there is some kind of crime that makes some (inaudible). In any event, (inaudible) because (inaudible) you're going to (inaudible). But any individual seeking abortion, to give that person a permit, (inaudible). In my opinion, (inaudible).

CHAIR: Senator Ruddick.

RUDDICK: (Inaudible). (Inaudible) other parts (inaudible). (Inaudible) trespassing (inaudible) some way (inaudible) area (inaudible) if it's (inaudible) area. I know, (inaudible) degree of (inaudible). I don't (inaudible) what is (inaudible).

HILL: Because a public sidewalk has always been a traditional forum for constitutional protest.
CHAIR: Senator Ruddick
RUDDICK: Well, then, why can a police officer do that? It doesn't have to do with what he thinks. (Inaudible) been there (inaudible) setoff (inaudible) you believe (inaudible).
HILL: That's right. But he must be justified, and if you don't, you go to court and you fight it out in court and he sits there and says I was justified (inaudible). The judge says, "I believe so, too. (Inaudible) but at least you have the right to stand there and (inaudible) yourself (inaudible).
MAN: (Inaudible)
CHAIR: Senator Ruddick
RUDDICK: So, what concerns you is that in this legislation you've got an 8 foot area by law we're defining that as a threat rather than the officer saying that's a threat.
HILL: My threat is that this thinking and, by the way, we had some clarification. Was the civil damages part of this removed in the House Committee, or was it not, because I think it appears in the latest version.
FEELEY: Madam Chair.
CHAIR: Yes. Senator Feeley.
FEELEY: No. The civil penalty provision appears in Section 2 of the reengrossed Bill. However, if I could elaborate on that a bit.
CHAIR: Yes.
FEELEY: There was a House amendment to clarify that. If you have a copy of the Bill in front of you, there was a House amendment that said that the civil penalties for the civil damages would arise only in the event of a violation of, and the House added Section 18-9-122(2). That, in fact, would refer you, if you look at the previous page, page 2, line 11, so that

provision of Section 1. what the civil penalty does not address is the language appearing at paren 3, from line 14 on page 2 through line 21. If I could just explain that a little bit. That we didn't want to do because we recognize the importance of the First Amendment right for sidewalk protestors. What we didn't want to do is cause someone to invite the opportunity for a civil lawsuit. We didn't want to have someone walking up to a clinic saying, "Hey, I've got a great idea. I've got a good lawsuit. I want to invade that 8-foot zone myself in order that I might be able to precipitate a civil lawsuit." So the House Amendment which I thought was very well thought out excluded that potential from civil remedies. However, the civil remedy does arise if a person knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a healthcare facility as provided in subsection 2, so, I hope with that clarification and that explanation of the House Amendment, that issue has been addressed.
LADY: (Inaudible.)
CHAIR: Thank you. Senator Blickensderfer.
BLICKENSDERFER: Thank you, Madam Chairman. And this is really more directed to Senator Feeley. There was discussion by this witness and some of the prior witnesses about the costs that have been incurred, in particular. I know Mark Simon talked about police coverage for $60,000 a day and our current witness is talking about more litigation expenses and that sort of thing. With the two current bubble ordinances in Denver and Boulder, are there significant decreases in the need for police, or is there any sense that there is a need or less need for police protection?
CHAIR: Senator Stevens.
STEVENS: Thank you, Madam Chair. Senator Blickensderfer, from my understanding of Mr. Simon's

testimony, prior to the institution of the bubble ordinance in Denver, that the police costs were in the neighborhood of $60,000 a day to deal with Denver's situation a real problem. Since the passage of the bubble ordinance in Denver, there's been a minimization of police problems (inaudible). These expenses have not (inaudible).

MAN: Thank you.

CHAIR: Any further questions?

HILL: (Inaudible).

HILL: I think (inaudible) law into your hands. (inaudible) ordinance, because (inaudible) no (inaudible). (Inaudible) court (inaudible) have been acquitted (inaudible) case (inaudible) been filed against us (inaudible). Again, we (inaudible) court (inaudible) yes or no to a (inaudible).

SOMEONE ELSE: (Inaudible) this Bill.

SOMEONE ELSE: (Inaudible).

LADY: (Inaudible) in Denver (inaudible).

CHAIR: All right. Thank you.

LADY: Thank you.

CHAIR: Oh, and I'm sorry, I'm going to have a problem with the last name. The first name is Michelle

RADER: Rader.

CHAIR: Rader. Thank you.

RADER: My name's Michelle Rader, and I would like to thank you for giving me this opportunity to speak to you tonight. I believe the way this law is written it's meant to intimidate and harass pro-life persons. It says nothing about Jews for Jesus or animal rights activists. This language, this law was designed to get rid of us, to throw us right out of the arena. If this law goes through, it would stop some people from picketing for fear of getting arrested. A lot of people are like me, still in college. Soon I'll be out looking for a career, but

who's gonna hire me with 10, 15, 20 pages of arrest record. If you take away our freedom of speech, we cannot inform or educate people. The girls and women already have legal recourses. They can file harassment charges without this law. This law isn't meant to help anyone. Its only real purpose is to hurt pro-life persons, to keep us from speaking out. You give women the right to freedom of choice, but how can we expect a woman to make an informed decision when they only know one side of the story. A choice is going to Baskin-Robbins and choosing between chocolate, walnut or rocky road ice cream. Abortion is a major decision. Unfortunately, most women have to make this decision alone. I did and I know I'm not the only one. As soon as I said the word "pregnant," he was history, never to be heard of, from again. I was scared and all alone. I was too embarrassed to ask for help. If this law had been in effect then, I would not have got any information at all and gone through with my abortion because the only people that were on my side were the people at the abortion clinic. They knew exactly how I was feeling and what to say to make it all better. In my heart, I knew abortion was wrong, but it didn't matter. I had never taken responsibility for my actions so why start then. One of the major reasons I did not go through with my scheduled abortion was a picture I was given while I was pregnant. This was the first time I had ever seen the other side of the story. I think I speak for a lot of women, myself included, when I say abortion is the only way out because of it's all I knew. In Sex Education, I was not taught about adoption or the fetus or anything like that. All I learned about was venereal diseases and abortion. The people supplying the pamphlet helped me make my choice. I got an informed decision, I got information from both sides, and I made an informed decision that my son and I could both live with. Be-

cause of this picture I was given, right there, this little boy got a chance at life that he would never have had. I gave him life, and out of love for my son, I gave him a better life. On January 5th of this year, I gave him up fc: adoption. There is not a single day that goes by I do not miss my son. Seeing pictures of him so happy makes me realize what I did was the least I could do. when a person is standing out on the ledge of a ten-story building, you call for help. You call the police or an ambulance or you try to talk to them yourself. You don't just assume they know what they're doing, and in the end the choice is theirs, but I'm not gonna stand by and watch and watch them jump and walk away and pretend nothing ever happened.

CHAIR: Are there questions? Senator Lacy.

LACY: How did you find out? I mean, how'd you get the information you were on your way to an abortion clinic?

RADER: From the pro-life people.

LACY: And they were on the sidewalk? Where were they when you got the information from them?

RADER: They – I was on my way. They were not right in front. They were walking from their cars to go down there.

LACY: And they approached you with literature?

RADER: And, you know, a lot of people think these girls know what they're doing. I speak for myself and I know I'm not the only one. I didn't know what I was doin'. It was the only thing I knew. I didn't want to have an abortion, but I didn't know anything else.

CHAIR: Thank you. Senator Peterson.

FEELEY: I just want to follow up on Senator Lacy's question. (Inaudible) information available you held out your hand?

RADER: No, I didn't. No, I was too embarrassed. No, I would have never done that. I wanted everybody to think I

knew what I was doing. I knew I didn't know what I was doing, but

FEELEY: When you first met them, were they as far as Senator Wham is from you right now?

RADER: No

FEELEY: You didn't see them until they'd come that close?

RADER: I didn't know who they were, no.

CHAIR: Senator Mutzebaugh.

MUTZEBAUGH: When did they give you the material?

RADER: Pardon me?

MUTZEBAUCH: When did they give you the material?

RADER: I was 11 weeks pregnant, when I was 11 weeks pregnant.

CHAIR: You were going to the clinic?

RADER: Um hum.

MUTZEBAUGH: Tell me what happened.

RADER: I had scheduled an abortion. I was gonna have an abortion, and I just went down, and I was walking from my car into there, and some people were step, gettin' out of their cars, and I did, they didn't have time, they didn't have anything. I didn't know they were prolife people. And I, I was cryin'. I mean, I was just, I can't say hysterical, but I was cry, I mean, they knew what I was there for. It was obvious.

MUTZENBAUGH: Did they walk up to you and ask you to take the information?

RADER: Oh huh. They asked me if I knew what I was doing, and I said yes.

MUTZENBAUGH: Did you?

RADER: And then I broke down and started cryin'.

MUTZENBAUGH: And they offered you the information?

RADER: Uh huh.

MUTZENBAUGH: And you took it?

CHAIR: Thank you very much. Philip Faustin?
FAUSTIN: Madam Chairman.
CHAIR: Is that correct?
FAUSTIN: It's Faustin. May I ask (inaudible) a question?
CHAIR: No. I'm just calling them as they signed up.
FAUSTIN: May I (inaudible).
CHAIR: Surely. Mr. Watwood?
FEELEY: Madam Chair.
CHAIR: Yes.
FEELEY: Madam Chair, I'd just like to introduce Mr. Watwood who is a friend of mine and was also my able opponent in the recent election, and it is only by accident that I am sitting to his right at the moment.
LAUGHTER:
WATWOOD: Thank you, Madam Chairman, for allowing me to testify to the committee. It's always a pleasure to be next to Michael. We've enjoyed punching each other around for two or three months this last fall, but he certainly has been a worthy opponent. I'm coming here to testify with regard to H.B. 93-1209. My name is Lynn Watwood. I am an attorney in the State of Colorado registered to practice. My law offices are downtown at 1999 Broadway. I am affiliated with a group called Robert A. Lees and Associates. I'm here on behalf of myself. I have been previously involved with organizations that are, been involved with freedom of speech, freedom of petition, freedom of religious expression. I've been four, at least four federal district court cases with regard to protecting those First Amendment rights. I recently, in 1990, won a case against the Denver Election Commission for violating the constitutional rights to clearly petition their government. Petitioners who wanted to refer the gay rights ordinance back to the people in the City and County of Denver. Judge Zita

Weinshienk agreed with me that, that, that the Election Commission had violated their rights. I was an attorney involved with the East Otero School District about five years ago where Judge Matsch agreed with me that the East Otero School District, by not allowing high school students to disseminate literature, be it political or economic or religious had violated the First Amendment constitutional rights of students and issued a permanent injunction against the East Otero School District. This past year, I was involved with the American Constitutional Law Foundation against Meyer, and Judge Nottingham agreed with me that the requirement that the Secretary of State Meyer was imposing upon state law with regard to disqualifying signatures on petitions that were not properly or technically acknowledged properly by, by circulators violated the constitutional rights to clearly petition your government under the First Amendment, and to also the freedom of speech to communicate your position to the voters so they could vote on it in the general election. So that background, I'm not saying I'm the greatest expert in the world, but I do have some background of fighting these things out in court and persuading judges in federal district court and I could say that what is attempted, whether nobly or not in this case with regard to protecting people entering and egressing from health facilities, I think it's completely unnecessary because the laws are already on the books with regard to trespass, assault and harassment. Getting beyond that hurdle, then we'd ask well, what would be the test of this law? In spite of that. In the constitutional test applied by the Supreme Court for the United States is a tripartite test where they must show, the people that want to restrict or impose prior restraint on constitutional rights to freedom of speech, must show that there is a compelling state interest. Well, first of all, they must analyze what the

forum is, whether you're talking about a public forum, a traditional public forum, a quasi-public forum, a limited public or private or quasi-private or public forum, so it's, it can get a little bit complicated. But then, the second thing that the people, that the court analyzes is whether there is a compelling state interest and, if there is a compelling state interest, then the prior restraint on that First Amendment right must be tailored in the narrowest proscribed manner to give the greatest freedom, otherwise, for the protection and exercise of that right. Thirdly, if they get over that hurdle of compelling state interest, then the restriction must be reasonable with regard to time, place and manner and must give the people that otherwise exercise their rights an alternative means of exercising those rights to the fullest extent possible. I think, and implicit in all that part of that three tripartite test is whether or not the legislation is vague or overbroad, and the Supreme Court, and I know there are lawyers on the Committee, and I know Michael is, will tell you the Supreme Court or courts with appellate jurisdiction, and, sometimes, trial courts, will very often, instead of getting to the nitty-gritty detailed substantive issues, if they find something is overbroad or vague on its face, will rule that it's unconstitutional. The definitions that are there in this, uh, first of all, with regard to compelling state interest, Senator Feeley said it is not legislation that is being single, that is singling out, pro-life people or against organizations like Operation Rescue, but I think all the testimony here, the gravamen of it, the preponderance of it, is talking about abortion clinics. On top of that, he said that this is a courtesy statute only. It's just a courtesy of people to go to health clinics. Well, courtesy is not a compelling state interest, not anything I've ever read in any of the law that I've been involved in and First Amendment rights, is courtesy is not a compelling

state interest. So, next, with regard to the definition. It's overbroad. If the idea is to, to, to stop certain types of activity in front of abortion clinics, then why aren't these defined in the Act? Why is it a broad health facilities? As a friend of mine said, what this particular legislation would possibly preclude is you handing out Pizza Hut certificates to people entering Denver General Hospital. So, I think, in that instance it's overly broad. Then, with regard to education, counselling, etc., those terms which are justifications for approaching someone with their consent, I think reasonable men can differ. People with average intelligence that are not lawyers would have a hard time dealing with those terms which would allow them either to approach someone or not approach someone. Now, with regard to leafletting, the Supreme Court of the United States recently, within the last two weeks, upheld the right of groups to leaflet, to hand out leaflets and fliers on property that wasn't even unlimited traditional public forum, the forum that is used as part of or has been opened up for certain purposes. The Supreme Court, when it comes to forums that are traditionally public, has treated them as sacrosanct and will look very with a jaundiced eye at any type of prior restraint on these constitutional rights. The United States Supreme Court, not too many years ago, overturned a federal statute that precluded demonstrations or picketing in front of the United States Supreme Court. That's Grace v. United States. The same supreme Court, in 1988, in Boos v. Barry, overturned a district ordinance that had a limitation of 500 feet exclusion of any kind of signs or protests against embassies in Washington, D.C., and so there has never been a bubble zone, so to speak, that has been approved by the United States Supreme Court, and if any of their past dealings with these issues are of any indication of how they would rule in the future, I believe when

you come to any kind of restrictions with, like any kind of footage that's in this Bill, any kind of a courtesy-type of an expression for the intent and purposes of a statute, I think will be struck down any time anything that's overly broad like this will not stand constitutional muster.

CHAIR: Thank you.

WATWOOD: I'm open to entertain any questions that you have.

CHAIR: Senator Ruddick.

RUDDICK: Mr. Watwood, you've done a lot of work in this area. Can you tell me to your knowledge if 18-9-107 involving obstruction to sidewalks or streets has been established as unconstitutional in the State of Colorado. And I ask that (inaudible).

WATWOOD: I have never.

RUDDICK: (Inaudible)wide open (inaudible) (Inaudible) simply be rendering passage unreasonably inconvenient.

CHAIR: Mr. Watwood

RUDDICK: (Inaudible)than this bill.

CHAIR: Mr. Watwood

WATWOOD: Well, that is a sanction under the, under the criminal code, and if the police want to apply it, they can, and, just like the question you asked of Mrs. Hill, if police have reason to believe that one of the laws is being violated, they can arrest someone, but then the question is whether or not that's a lawful arrest, and they can be prosecuted for false arrest.

CHAIR: Senator Ruddick.

RUDDICK: But under this section, it has nothing to do with peace officers, just like this when a peace officer issues a ticket or cites you under 18-9-107(1a). This seems less, or more narrow in its approach than the law under this section.

WATWOOD: We're talking about First Amendment rights. You have to weigh that and a public sidewalk is a traditional public forum, and the First Amendment, which is, was, is the freedom of speech, is, is in the Bill of Rights as the First Amendment because that is the most precious right that the founding fathers thought should be protected, and so, when you have to weigh any kind of restriction on that First Amendment right against the compelling state interest. Now, if they can show there's a compelling state interest, and that that person, that they have reason to believe that there is a material and substantive disruption on the spot, I don't think they have to ticket anybody. They arrest them on the spot.

CHAIR: Blickensderfer.

BLICKENSDERFER: Thank you, Madam Chairman. Mr. Watwood, your contention that this is overly vague, and your use of the analogy of the Pizza Hut certificate in front of the hospital, as I read this, that would not be an issue, because this deals specifically with oral protest, education or counselling. I don't think your analogy fits.

WATWOOD: Well, how does someone determine that, Senator Blickensderfer? How do you know? My point is that there's no definition of the word counselling, education? How do we know that education is handing out coupons for Pizza Hut is not educating someone that they ought to go to Pizza Hut instead of Dominos?

CHAIR: Which is a good idea.

WATWOOD: I agree.

CHAIR: Mr., uh, Senator Blickensderfer.

BLICKENSDERFER: I don't need to answer it.

CHAIR: All right. Thank you very much.

LOTS OF NOISE, SHUFFLING, ETC.

CHAIR: Identify yourself for the tape, please.

HANKS: Yes, my name is Leslie Hanks, and I'm the Executive Director of Citizens for Responsible Government. Good afternoon, Chair, Madam Chairman and Committee, and thank you for allowing me the opportunity to speak this afternoon. While Citizens for Responsible Government does not endorse or participate in protest activities related to the abortion industry, we are sympathetic to those who do. Our organization is the political arm of the pro-life movement in Colorado, and, as such, we work to support and encourage those seeking elective office who believe in the sanctity of life. We believe in the Declaration of Independence which states that all men are created equal and are endowed by their creator with certain inalienable rights, among them, life, liberty and the pursuit of happiness. We support the Fifth and Fourteenth Amendments and the U.S. Constitution which notes that the State shall not deprive any of life, liberty or property without due process of law. We believe in the First Amendment and the Bill of Rights which upholds the free speech rights of citizens without prior restraint and believe that content-based restrictions are clearly unconstitutional. We oppose targeting one group of people who protest while not restricting the protest activities of any others. We applaud the founders of the Republican Party who formed its first platform on the principal that no human should be considered the property of another. This is clearly the premise under which women believe they have the right to terminate the life of their unborn child. We firmly agree with Representative Charles Duke, who noted in the House floor debate that the Colorado legislature is restricted by the Colorado Constitution in Article V, Section 25 from voting a special privilege or benefit to any individual organization or association. We feel that it is most unfortunate that although there are pro-life legislators in this legislature, it

may very well be that none sit on either committee hearing this measure. We fear that this may not be a coincidence. Furthermore, we wonder if it may be a conflict of interest that of 21 legislators sitting on the 2 committees hearing this Bill, 10 have their names on the current National Abortion Rights Action League PAC Fundraising Invitation. NARAL would clearly benefit from this legislation. Also, of 18 of the Bill's sponsors, 16 have their names on this same invitation. Finally, I would like to point out that although our members are not wearing tags opposing the unconstitutionality of this legislation, you may notice, if you look closely, a pin which is a replica of the fully-formed feet of a 10-week unborn baby that pro-lifers wear. I brought one for each of you. Our organization opposes House Bill 1209. We support the free speech rights of pro-lifers who know that an unborn baby's heart beats at 18 days after conception. That's why we say abortion stops a beating heart. Please don't prevent them from sharing the truth with women who may otherwise carry a deep pain within their hearts forever after learning their baby is far more than the blob of tissue Planned Parenthood tells them they are removing. I would like to ask you to vote no on House Bill 1209.

CHAIR: Thank you. Are there questions? Senator Lacy.

LACY: Thank your Madam Chairman. In the discussion before, and I've heard it in other situations having to do with the clinics, the percentage of the people who are going there for other than abortions, it was indicated that there was 7% at Planned Parenthood that attend for abortion, which leaves 93% of those people going there for other reasons. What's your thoughts on those numbers, number one, and what's your thoughts about some of the encounters that that they have when, in fact, they have nothing to do with an abortion.

CHAIR: Ms. Hanks.

HANKS: Thank you. As a matter of fact, I do believe we have some people that have been involved in picketing that would address that issue. I'm not sure whether they'll have the opportunity to speak today. I have no way of knowing whether only 7% of the people going into Planned Parenthood are indeed seeking abortion. It raises a question in my mind, but I'm really not certain. However, I, I know of one gal who's with us today who would be speaking to you about her activities at Humana Hospital where abortion is something that's performed there, and I believe that is in your district, Senator, and when she passes out literature to people that are going into the hospital, she has no way of knowing whether or not they actually would be there to receive an abortion, but she has, I think, on some occasions, felt like the people receive the information gratefully so because they would not necessarily want to go to a hospital that was procuring abortion for women and, and they might choose to go elsewhere for their medical services. So, that doesn't exactly answer your question about Planned Parenthood. Frankly, I guess, I don't feel like if somebody was handed a leaflet and they were going in for a pap smear, and so they hand it back to the woman or they save it for a friend. I mean, that could possibly happen.

CHAIR: Thank you very much.

HANKS: And I do have a written statement for you that I'd (inaudible).

LOTS OF PAPER SHUFFLING.

CHAIR: Marjorie Hopfenbeck. Identify yourself please.

LADY: My name is Marjorie Hopfenbeck, and I thank you for allowing me to share a little bit of my story. I am on the other side of the fence at 20th and Vine. I see a different picture than what has been alluded to today in other testimony. As

picketers, we endure a lot of verbal abuse. We have a lot of vile language directed at us. The middle digit of a finger is often directed at us. I have never seen a protestor or picketer, rather or a pro-life picketer using vile language. I have never seen one using obscene gestures. I sincerely believe that the motives of prolife picketers are to save babies' lives, to save emotional as well as sometimes physical harm to the mothers. I believe their motives are pure. They are there voluntarily. They are there with motives, and I don't believe that I have ever seen them accost anyone in a menacing manner. I don't believe that I have. I don't. I know I have never seen them call out to a patient and call her murderer. I believe there have been times where maybe some of the Planned Parenthood people have been the object of that, but not any prospective patients. The protestors that are pro-life are there to be supportive to the mothers that are going in for an abortion. They want them to have information. We have information to give them about crisis pregnancy centers. We have information to give them about alternatives to abortion. The crisis pregnancy centers that they are told about offer them services that often times are free. They do not have to pay for them. They are offered counselling. I would question some of Planned Parenthood's knowing really how that counselling goes. I have not protected a lot, but I have been at Planned Parenthood a number of times, and I don't believe that I have ever seen a Planned Parenthood person out there listening to how a prospective patient was being counselled, so I don' t know how they can say that it wasn't very good counselling. I would welcome any questions as to motives and as to desires on the part of pro-life protestors. Thank you, Ma'am.

CHAIR: Any questions? Thank you very much. We have 11 people still signed up to testify. I would like to get the

Committee out of here by 6:00 o'clock, and we will vote on the Bill before we adjourn. So, I would ask now. We've heard from five persons on each side without restricting the time. I would like to hear, have people come and do not repeat anything we 've heard, and, also, limit, limit your comments to 2 minutes, and I'm just gonna call you. I'm gonna go back and forth as fast as is possible between pros and cons. Marilyn Shuey.

SHUEY: Chairwoman Wham and members of the Committee. My name is Marilyn Shuey, and I'm representing the League of Women Voters of Colorado. The League of Women Voters of Colorado support House Bill 1209 for the following reasons. A woman's constitutional right to seek medical care and counselling for an abortion should not be denied by threatening and harassing behavior at the clinic door. Women have been physically accosted and emotionally vilified, particularly by Operation Rescue members, whether they entered a clinic for an abortion or other reproductive medical care. At last count, there were some 55 anti-choice organizations active in Colorado. Most would outlaw abortion even when the health of women is threatened or in cases of rape or incest regardless of the victim's age. The League's position on reproductive freedom is grounded on the constitutional right of privacy of the individual to make reproductive choices. This can happen only if a woman can go to a clinic with the assurance of being able to enter in a calm and safe manner, the same as going to any other facility providing health services to the public. We urge your support for passage of this Bill. Thank you.

CHAIR: Thank you. Are there questions? Thank you very much. Lora Lee Gorton.

GORTON: Chair, I'll make mine really brief because of the time. I am a picketer and have been for years, and the reason that I'm doing it is so that the girls and the husbands and the boyfriends and the grandparents can all become informed about what they're really going in there for and what the alternatives are. I would not be a part of a group that would be violent or protesting in any way that would be not within, would be within our constitutional rights. I would withdraw from any organization. I have picketed in Boulder and in Denver and in Aurora at Humana and in all cases I've never seen anything violent or offensive by any of the members, and there's several different groups, it's not just Operation Rescue, Right to Life, it's all different groups, and we're just all, we want to prevent the violence that you see on the pictures there, so we wouldn't be violent to stop violence. That would destroy our whole purpose in what we're doing. The only time that I've seen anything where there was pushing and shoving was when the escorts, and I've stood right by them seeing them doing it to others who were picketing, pushing and shoving them, and I've not heard anything about this, but I saw it. That's the only thing I've ever seen that was, that I objected to. Okay? Thank you very much.

CHAIR: Would you wait for a question, please? Senator Lacy.

LACY: I guess your picture here I do find offensive. I happen to know what an aborted fetus looks like. I happen to have my own ideas about that, and it's because of situations like this, to where you feel like we have to be told, we have to be shown on a regular basis. You say you have not heard of anybody (inaudible) pushing, shoving or hateful in their comments.

GORTON: I said I never saw any violence.

LACY: Well, that's (inaudible) violence. Well, I consider violence by some of the comments having to do with when you discuss about an aborted fetus. I happen to be a pro-choice individual, and I do that because I was able to make a decision having to do with my own child, and I had her, and she's a beautiful child, and I'm very glad that I did that. But what I did not appreciate is the phone calls that I received because you nor anyone else knows unless I've told you where I stand on abortion. But you choose to constantly put this type of thing in front of my face, which I do not appreciate, and I, I apologize, Madam Chairman, because I came in here not knowing where I was going to be on this particular position, but unless we deal with the extremes on both sides of this issue, I happen to think that our society is going to be in great danger, and aborted fetuses or not.

CHAIR: Thank you.

GORTON: Thank you. I didn't (inaudible) offensive because I passed them upside down so that anyone that wanted to look could have that choice.

CHAIR: Thank you. Lois Mayerson.

MAYERSON: Good afternoon. I'm here today representing Colorado Citizens for Choice. We are a nonpartisan organization, we do not advocate abortion nor do we advocate women having babies. However, we are dedicated to the protection of the constitutional right of privacy of the individual to make fully informed reproductive decisions for themselves and to maintain a safe and legal environment in which they may carry out their own decisions free from harassment and intimidation. Protestors at health clinics have targeted only those clinics which perform abortions. They ignore the fact that many women who use those clinics are not there for abortions. Their behavior is aggressively obscene, verbally abusive, and

calculated to intimidate. They have chosen their targets with the belief that because the women using those clinics are disadvantaged, either because of money or where they live, that they are vulnerable and totally unprotected, that no one cares about them. They are mistaken. This State will not allow fundamental rights of individuals to be diminished or rendered useless because of how much money they have or where they live. This State protects the rights of all individuals, the rich and the poor, the rural resident as well as the urban. This Bill is a good Bill. It respects the rights of those who wish to protest and allows a measure of protection for law abiding citizens who are following their own decisions about what is right for them. While it does not eliminate the nastiness, the zealous obscene verbal abuse, the blocking of passages by cars, etc., it is certainly a welcome direction for this State to follow. For so many, many years, women have been regarded as second-class citizens. This is a step toward acknowledgement that women are capable of judging for themselves what is best for themselves and for their lives. Thank you.

CHAIR: Are there questions? Thank you.

MAYERSON: I have some handouts.

CHAIR: Phil Harrison?

HARRISON: I am Phil Harrison, from Colorado Springs, and I have come here to oppose House Bill 1209. House Bill 1209 as approved by the Colorado House of Representatives is totally unconstitutional, not in accordance with the Constitution of the United States as well as the Constitution of the State of Colorado. Amendment One of the Constitution of the United States tells us "Congress shall make no law abridging the freedom of speech or the right of people to peaceably assemble." The Constitution of the State of Colorado reads, "No law shall be passed impairing the freedom of speech.

Every person shall be free to speak whatever he will on any subject being responsible for all abuse of liberty." The picketers of Operation Rescue have in all instances participated in peaceable assembly, even to the point of instructing participants that they would be asked to leave the area if they do not comply. Operation Rescue leaders will go to the extent of requesting the authorities to remove any individual not complying with peaceful assembly. The right to free speech has been upheld by the United States Supreme Court in a number of cases. I believe my predecessor, the attorney that preceded, went into the many cases that state about free speech, so I will not go into those. The bubble zone provision of House Bill 1209 directly burdens these traditional free speech activities. Under this provision, a person can simply hand out leaflets in silence to passersby. Instead, the person must ask and receive and express oral consent in advance in order to approach close enough to hand out a flier. A counsellor who wants to offer information on alternatives to abortion must likewise stand back, call out for and receive, in advance, express oral consent to approach to a point where semi-private conversation may be held. In effect, the bubble zone converts virtually every form of public communication into a verbal solicitation. Although the content of this proposed Bill hides under the color of healthcare facilities, it is obvious that this Bill is only applicable to the persons of the prolife persuasion and is, therefore, also unconstitutional as targeting a singular group, namely pro-lifers of this state. It should be obvious that House Bill 1209 is unconstitutional and will only lead to extensive litigation and expense if passed by this legislative body. I therefore request that this committee defeat its passage for unconstitutionality and the targeting of a singular group rather

than for the health and welfare of the State in general. Thank you.

CHAIR: Thank you. Senator Feeley.

FEELEY: Yes. Thank you, Madam Chairman. I just want to clarify one thing. It was a blatant misstatement made by the witness here. There is absolutely nothing in this Bill that requires oral consent. It was specifically omitted. I would be surprised if the witness, if he can point to in the Bill, I'd be very surprised, but the Bill was very carefully drafted not to impose such a requirement of oral consent.

CHAIR: Thank you.

HARRISON: It is very evident that it does require oral consent, maybe not in a specific word that is in that legislation, but the intent of the legislation is there.

CHAIR: Thank you. Marie Perkins. And I will, again, ask you to confine your remarks to a couple of minutes.

PERKINS: I'm sorry. This is a pamphlet. First of all, I am Marie Perkins. I am from the City of Boulder. I am glad to be here today to testify before you. I'm sorry I didn't make the cut of the first five people that were allowed to testify for the pro-life side, but I am here, and I have some significant things to say, and I would like to say first of all that I have a pamphlet that I do offer women on the public sidewalk in front of abortion clinics, and I would like to hand this out today.

CHAIR: Just leave them there, and we will hand them out later.

PERKINS: Oh. All right. And I'm not even eight feet. I mean, I must be more than 8 feet, Madam Chairman.

CHAIR: That's right.

PERKINS: All right.

CHAIR: You are.

PERKINS: And you're refusing to take this leaflet and other things?

CHAIR: That's right. I just said leave them, and we will pass them out later.

PERKINS: First of all, I would like you to know that I will give you some background here on the Boulder buffer zone. I have lived in Boulder for 20 years. There was considerable testimony given at the City Council about whether or not people approved or disapproved of the buffer zone. And input was asked from various individuals in the community. The Police Chief at that time, Chief Jay Probst, came down to the City Council and testified that there was no need for the Bill or for the ordinance. And he recommended that they not pass the Boulder buffer zone ordinance, and he suggested several practical things that abortion clinics could do if they really felt that there was a harassment problem on the sidewalk, and these were all discounted by people who were running the clinics, and at that time, the Mayor said, "Thank you, Police Chief Probst. How many feet shall we make this?" which, when you have someone of the caliber of a police chief come down and testify, I think that that needs to be taken into consideration, and I would ask you where are your pages and pages of harassment violations that you surely must have if you are going to present this kind of a bill to the legislature of Colorado? Now, I would like to just quickly read you general offenses that are in the laws in Boulder. I just picked this up from the Boulder Clerk. These are physical harrassments, either offenses against the person. These are use of fighting words, these are also obstructing public streets, places or buildings, and the part that's, uh, Senator Ruddick quoted for the purpose of this section, "public place means in any public highway, street, alley, walk, parking lot, building, etc., any of

those portions of either private or public property in which there would be a problem." These are offenses against persons, should you do any of these things. Now, I would ask you whether approaching someone within eight feet with the intent of giving a pamphlet on community and state services that would help a pregnant woman, in other words, an alternative information pamphlet, whether this is an offense against the person. Because, clearly, in here, it says, Section 3, "No person shall approach another person within eight feet of such person unless such other person consents." Now, coming over here, today, on the little free trolley, a woman walked up and said, "Could I give you this, please?" and I reached and took it. It didn't bother me. She said, "You'll get a free tooth brush." Well, of course, I have to go up and make an appointment with the dentist to get it, but I can reject it. I can tear it up. I'm not threatened by the fact that she handed me something. And I would challenge anyone to say, including the Chairman, that this pamphlet of various agencies and services that help women in the state and the community, pregnant women, women in crisis, who will not get that information on the public sidewalk. I challenge you to say that I am threatening any person on that sidewalk with that information, particularly when I may not know who it is that I would like to give that information to. If I would like to just protest abortion alone, I should be able to walk up to anyone within eight feet and say, "Could I give you some literature today?" I have never had a complaint issued against me in the City of Boulder, there has been no arrest for harassment in the City of Boulder before or after the buffer zone. And so I want to say finally, to you, my free speech rights, love it or hate it, but leave it alone unless I actually commit a crime against a person which are clearly stated in any harassment laws in any city or town in this state. Thank you.

CHAIR: Thank you. Senator Blickensderfer.
BLICKENSDERFER: Thank you, Madam Chairman. Can you tell us how your practice has changed between before the time the buffer zone was in effect and now? Do you, you say there have been no harassment charges or anything brought by the city against you or anybody else.
PERKINS: Right.
BLICKENSDERFER: But how have you changed your practice to conform to the buffer zone while still accomplishing what you set out to do?
CHAIR: Ms. Perkins.
PERKINS: Well, actually, Madam Chairman, thank you. What actually happens is that the woman is intimidated. This serves to intimidate the public from taking the literature, because I stop eight feet from her, and she thinks, "What's happening?" They have no idea that there's a law that you must stop eight feet before you offer literature. So she's less likely to take it. I just demonstrated that with the piece of paper that I was offered today. When you can step up to someone and say, "Could I give you some literature today?" Normally, they take it. If they don't like it, they tear it up. They don't have to look at it. No one's forcing anyone to look at this literature. So, in fact, it intimidates the person on the public street who might ordinarily take it, for whatever reason he wants to look at it, and I think he or she has the right to get it.
CHAIR: Senator Blickensderfer.
BLICKENSDERFER: Madam Chairman, I'm not quite sure you got to where I'm leading. Is that what you do now? You stop at eight feet and
PERKINS: Yes, I do.
BLICKENSDERFER: Do you talk to the person?

PERKINS: If there, there are many times when I might turn around and someone's already facing me.
BLICKENSDERFER: Um hum.
PERKINS: In which case, according to the law, I cannot say anything, because she's within my eight feet. You know, at some point, we will. The city attorney is very concerned that someone's gonna challenge this. At some point, I will say to the woman, as I turn around, at two feet, "Could I give you some literature today?" Particularly, a woman who's crying. I have had people come out to get what I had because I said to them, "If you go in there and you need some alternatives, you need some help, I have a pamphlet I can give you. Please come out." I don't think that I'm offending the person, that this is an offense against the person, which is what this law is gonna do. It's gonna make it an offense for me to walk.up within eight feet of someone 100 feet around an abortion clinic and give out some literature. If I have offended someone, charge me with the laws that are on the books, don't make up a law that prohibits me from getting my free speech right on a public sidewalk.
CHAIR: Senator Blickensderfer.
BLICKENSDERFER: I have some follow-up questions, Madam Chairman. How long has the Boulder ordinance been in effect?
PERKINS: I think it's been about 7 or 8 years.
BLICKENSDERFER: And you haven't had any complaints been registered against you?
PERKINS: We have never had a
BLICKENSDERFER: Since the ordinance went into effect.
PERKINS: Absolutely not. Or before. There were no charges of harassment.
CHAIR: Thank you. Senator Feeley.

FEELEY: Very quickly. I just want to clear up one point the witness made, and that is the attorney's concern challenge to this Ordinance. That, in fact, has been done, and Judge weinshienk, in 1987, determined that the Ordinance met constitutional scrutiny.
PERKINS: Well, it won't hold up in a higher court, and
CHAIR: (Inaudible).
PERKINS: I'd like to answer. We've spent $50,000 taking that to a federal court.
CHAIR: That was a federal court, Miss Perkins.
PERKINS: Yes.
CHAIR: It was a federal court.
PERKINS: Yes, it was.
CHAIR: Thank you.
CHAIR: Ann Sullivan.
SULLIVAN: My name is Ann Sullivan. I am from Colorado Springs. I've spent a great deal of time on sidewalks outside of medical facilities and other buildings, both public and private, in three states, for the past several years. I carried signs and handed out literature to people entering and leaving these buildings, whether they wanted it or not. I have even walked along with them explaining to them my point of view. My signs were large enough to be seen at least 20 feet away, and my voice reached far beyond that. I didn't even know why these people were going in and out. I just knew that those who sent me said to talk to everybody. On nice days in the summer, I even brought my children with me. Who can resist taking a pamphlet from a smiling little child? On occasion, I have walked up to the doors of private homes trying to persuade them to do things my way. The polite ones merely said, "No, Thank you," and closed the door firmly. Some threatened to call the police if I didn't get off their property. Others were very

interested in learning the truth of which I spoke and thanked me for bringing it to them. Under cover of darkness, I have trespassed onto private property while large, important meetings were going on inside and place my pamphlets on the windshields of cars. Fortunately, I was never caught. Do I sound like a dedicated pro-life sidewalk counsellor? Worse than that. I'm a dedicated Republican campaign worker. And that's not easy when you live in a southern state. All of these activities were approved in practice by political parties. Campaign workers and sidewalk counsellors have a lot in common, including stretching the law. If you put a muzzle on one, you'll be muzzling yourselves. There are other important questions you should ask yourself when considering this legislation. Number one, you've already answered. Number two, who will benefit from this Bill? Look to see how many medical facilities are represented here. Is there more than one? In Colorado Springs, there are at least six places that do abortions. Only one considers sidewalk counsellors a threat. Do you want to pass laws that benefit special interest groups? Number three, are actions described in all of this testimony already covered by existing laws, such as nuisance, trespassing, littering, harassment, noise abatement? Do we need a law to control every conceivable human activity? Number four, how many people approaching a medical facility on foot would benefit? If you look at these buildings, you will see that almost 100% of them have a private parking lot attached to the entrance. Women coming for an abortion would surely not arrive or leave alone and on foot after having such a serious procedure.
CHAIR: Would you finish quickly, please?
SULLIVAN: Just exactly where does this bubble begin and end? Both the person approaching and the counsellor are

moving. If the person hesitates and the counsellor moves closer than eight feet, does the bubble disappear because they appear to be listening? If the person walks faster than the counsellor and includes the counsellor in the bubble, can the counsellor charge that person with entrapment? If there are two persons approaching at the same time and the driveway entrance is less than 16-feet wide, which bubble is the counsellor obliged to observe? If the bubbles overlap and the counsellor ends up in both bubbles, is he or she in double jeopardy? You may think I'm joking, but I've heard stupider arguments over lesser matters in court, and I' m sure you have, too. Will any of this hold up in court, or will it get dismissed for silliness? Will this have an educational or deterrent effect on those arrested? Probably not. Sidewalk counsellors are not paid for their work, and they are accustomed to disappointment. They will just find another way to do it. Will it stop others from becoming sidewalk counsellors? We'll never know because you cannot measure something that didn't happen in the first place. When counsellors are arrested, who will pay the bill? One guess. You're right. The taxpayers, of course. In El Paso County, the judges are notoriously unsympathetic to pro-lifers. Unlike legislators, they don't seem to worry about returning to office. If 1209 becomes law, you will be handing them another tool with which to gouge the taxpayer. They can't wait to get their hands on this one. They customarily give maximum.sentences and fines for trespassing on clinic property, which is a misdemeanor. Rightly so. After all, didn' t they break the law? Of course, the guilty one will not or cannot pay the fine, so they go to jail at a cost of $65 per day to the taxpayer. The City brings charges, so taxpayers pay the court costs. All this comes at a time when we are looking at more jail space to hold more prisoners. In the recent past, 9

people were charged for trespassing at a local clinic in a four-day trial. The clinic would accept no plea bargaining. All were found guilty and went to jail. The prosecutor wasn't too happy about this because at the time there were 15 murderers, including the killers of Diane Hood and Lane Schmidke, awaiting trial. He wasn't overjoyed that his assistants that were investigating trespassing cases. Finally, I ask that you set aside your personal views on abortion, be they pro or con, and consider H.B. 1209 as objectively as possible. I have not given you a lot of case citations because we are concerned what happens now and in the future in Colorado, not what has happened in other states. We as voters expect you to pass strong legislation that would have at least a 90% chance of standing up in court for both convictions and constitutionality. Although this Bill is listed as having no financial impact, we know that court costs, jail sentences and additional jail cells have a very definite, though indirect cost to the taxpayers. Remember, that in the past election, the poor state of the economy and government fiscal reform were and still are the primary issues. Abortion is way down the line. Are you willing to give us responsible cost-free legislation? Thank you.

CHAIR: Thank you. Cleta Jasper. I really must ask you to be within the two minutes, please.

JASPER: I have truncated my remarks for you.

CHAIR: Good.

JASPER: I am Cleta Jasper from Colorado Springs, and I appreciate the opportunity to speak in opposition to the Bill. It appears that you desire to protect abortion seekers, and for that desire, I commend you. However, the reality of the Bill is protection of abortionists and their lucrative industry. Women, again, are the victims. Abortionists fear women's ability to cope their problem pregnancy. They have been known to

exploit her fears to keep her on their abortion tables. They lose money if she changes her mind and goes home. I'd add that not only are pro-lifers the people helping women with material and emotional assistance during her pregnancy, but they also pick up the pieces after her abortion and strive to bring the abortion-damaged woman back to wholeness without condemnation. Post-abortion syndrome is a very real pain felt by multitudes of women for years after an abortion. I would urge you to kill this Bill and allow the sidewalk counsellors to do their work.

CHAIR: Thank you. Barbara Jacobson.

JACOBSON: Thank you. Just about every argument that can possibly be made has been made, so I only have a few comments. I am a person who will not hesitate to picket at a hospital or an abortuary, which is what I call it, because I feel it is, it is wrong, the killing of children. And that's why I'm out there. I don't make a dime. I spend my time. I have my husband's approval and my children's approval. I have handed out very little literature when I have been outside the hospital in Aurora, which is the Humana Hospital. There are a few doctors there that will perform abortions. Excuse me. I don't want to call them doctors. There are people there that will perform abortion. In the past, I've always considered a doctor someone who has healed, someone who has saved life. I don't see that happening now with those people that perform abortions. I understand that the people that, the abortionists, do not have to take the hippocratic oath. That was what I understood a long time ago. When you went to a doctor, you went for healing. You have described in your Bill these facilities as health facilities. I ah, I have a hard time finding a health facility any place where a human life is taken, and so I would ask you to change your terminology there, and I would ask you to,... my husband is a police officer. We are in a city

that is understaffed for police officers. They don't have time to go on calls like this, and this is a costly procedure to the city. It's a costly procedure to the state for you to enact this legislation. I ask you, please say no to 1209.

CHAIR: Thank you.

CHAIR: Senator Lacy.

LACY: I worry about the other people that are going there, not for an abortion.

JACOBSON: There are a lot of people who will not go back to Humana Hospital because they know there are supposed doctors there that are performing abortions, and I say I am proud of that. I am proud of turning people away from that hospital, and I will not say no to standing up and speaking out against an atrocity in this country.

CHAIR: Senator Hopper.

HOPPER: I'd just like to follow up on that. You're talking about the hospital, but what about Planned Parenthood? There are a lot of young women, women, young and old, who can, can only get their gynecological care at places like Planned Parenthood because they can't really afford, if they don't have insurance or for another reason. And so, if they're going in for a pap smear, should they, should they be subject to this sort of, sort of. you know, what you call counselling?

JACOBSON: I understand that Planned Parenthood makes a lot of money off of abortions. I see that as a money-making proposition for them. I think there's plenty of places where people can go if they want to find out information, gynecological information, where they will receive low cost care, and I'm not so sure that there are steps that prove that Planned Parenthood is the only place you can go to get information, to get condoms. They distribute condoms guite boldly to teenagers. And, incidentally, I've stood up in proceedings

where they wanted to institute that procedure in the Aurora Public Schools, passing out condoms to teenagers.
HOPPER: That's not what I asked.
JACOBSON: What I'm saying is you can go elsewhere to get condoms and information and low cost care.
HOPPER: Thank you. Would you get a list of those to me? Just, say, in the Denver area? That would be helpful.
JACOBSON: I'd be happy to.
CHAIR: Thank you. June Harrison.
HARRISON: My name is June Harrison. I'm from Colorado Springs. I think just about everything has been said, but I think I can add a little bit something. I thank you for this opportunity to be here this afternoon. I have been involved in pro-life activities for approximately the past 10 years, I have written letters to our congressmen, both at the state and federal levels, letters to the editor, participated in local and state marches for life. This past January 22, I participated in the March for Life in Washington, D.C. Also, during this time, I have been exercising my constitutional First Amendment rights of free speech and peaceable assembly. I've been called every name under the sun. Gotten, somebody mentioned this earlier, gotten the finger hundreds of times, and, yes, I've even had a death threat. We were at Planned Parenthood one time, and when we got home, there was a call on our answering machine that said - this was in Colorado Springs - that the next time this person saw me at Planned Parenthood, he was going to shoot me and my husband, and we did turn that tape in to the Sheriff's Department in El Paso County. I've, and you've heard all the things on the 8-foot bubble zone, and on the 100-foot situation, but, and I would, too, like to say that this proposed legislation is definitely discriminatory in its proposed limitation of free speech and assembly. Its limitation targets a small group of

people whose actions another small group of people disagree with, certainly not worthy of becoming state law, and all out, all the testimony that I have heard today is mainly that is with Planned Parenthood at 20th and Vine, and there are other. We have a Planned Parenthood in Colorado Springs. There's a, an abortuary in Grand Junction, and abortuaries up in Vail, and all over the State of Colorado, and, yet, you're targeting this Bill that is coming before the legislature just for one particular area and that is, is, was mentioned by Mr. Watwood that this is certainly not in the interests of the State. Also, I would like to say that this past January on our way to Washington, we were out here at Stapleton Airport, and I heard a public announcement over the loud speaker saying that there could be people distributing literature in the area, that these people were exercising their First Amendment rights and people could either accept or refuse the offered literature. There was no 8-foot bubble zone around me to protect me from their unwanted approach. Should there be? Or will there be? Is there going to be a new law written every time someone doesn't like the activity of someone else? You people would be very, very busy people. Peaceful demonstrations, pickets and protests are activities generally protected under the First Amendment to the United States Constitution. No matter how offensive the language may appear to be, there can be no absolute ban on the right to free speech or the right to peaceably assemble. Because of the unconstitutionality of H.B. 1209, I urge you to reject this proposed legislation. I also have a list of case law that, a whole list, if you're interested, of cases that have been ruled on, and I also sent this same list to the Honorable Jean Atkins who is State Chairman of the House Judiciary Committee. If any of you are interested in this, it's a whole list that I would be willing to leave.

CHAIR: Thank you.

CHAIR: Thank you very much. Philip Faustin. Keep it short, please, Mr. Faustin.

FAUSTIN: I've got a couple things that I feel haven't been covered so far. I will be very brief.

CHAIR: Thank you.

FAUSTIN: One is the image that has been given in a lot of the testimony, much of which really hasn't had to do with this Bill. People are talking about shouting and all these different goings on which I don't like, either. But this Bill wouldn't stop that. If someone is prone to that type of thing where they like to yell at people and if they want to harass someone or do something like that, this Bill won't stop that. You can't prohibit that. As much as we might dislike things that people say on any issue, we can't absolutely stop that. So what we're dealing with specifically on this Bill is the 8 feet within 100 feet of the door which, in most cases, is out on the public sidewalk, and as you think about this, you might think well this, as Senator Feeley said, it's a courtesy bill, a common courtesy sort of thing, trying to civilize the sidewalks. But have any of you ever been approached by a Kirby Vacuum salesman? Okay. Did you enjoy that experience? Probably not, but how does the Kirby Vacuum salesman work? Does he stick a flier on your door or have someone call you and say - I hope no one here sells Kirby Vacuums - "I sell Kirby Vacuums. If you would like to buy one, give me a call." It doesn't work that way. Usually, they figure out a way to get into your home, and they've got their sales pitch which I remember as a young child from the man being at our home coming at 8:00 o'clock and leaving at midnight, four hours worth of every kind of conceivable demonstration you can imaging from shampooing a little spot of the carpet to waxing a little spot of the floor to even

vacuuming the mattress on the bed to show how you could bring little things out of that, and his whole goal over that period of time, after my father said over and over, "I'm not interested. We'll take the steak knives, but you can go home," he kept going on and on. He was a professional salesman. That's his job. He knows that you're not gonna just sell it by putting a flier on the door or your first time the person says no to you, so, as we're looking at this, if you view everything that a pro-lifer does towards a woman seeking abortion or someone going into one of these places as harassment or designed to just intimidate them or something like that, well, then, you would accept this Bill as a logical thing. But what about the women, like Michelle, who testified earlier, that have changed their mind? Why did they change their mind? Because she was given some information. And that's what we're there for - to give that information. Now, this Bill, in the introduction to it, talks about medical counselling and the importance of that, but true medical counselling is not given in these facilities. We have challenged Planned Parenthood at the Vine Street Clinic to let us co-counsel these people, let us have our literature, let us have a little desk up front there and talk, and we'll quit picketing you. Did they say, "Fine. You know, we'll do this in a nice civil way. You sit at your desk and if they come in and want to talk to you, that's fine." No. They declined that. Why? Because they'd lose business. That's the issue, here. It's the abortionist protection bill. So, that's what we're there for - giving proper, true medical information, not biased pro-life information, scientific, maybe an actual photograph of a baby at that stage of development, which is a very beautiful picture of an 8 or 12-week-old child. Maybe it's just a list of, "Here's what's happening to a fetus child at this stage of development. Here's the scientific things going on inside of that." That infor-

mation is not being given inside. I think women have a right to that information. Now, people talk about being pro-choice, but what is this Bill? Is this pro-choice? Is this saying, "Get all the information and then make up your mind?" No, it's saying, "You can't have the information," and I think it's close to what we see on this table right here. Now, a little bit of information from our side was passed out to people, and, of course, there was one piece that people found objectionable, but here's other things - none of these have pictures. They're just information. But they have been denied to the people on this Committee. Now, maybe they'll be passed out before the vote. I hope so. But will there be as much time for people to read through it and digest it and think about it, or will it be at the last minute? Anyway, my point is

CHAIR: And then will you finish?

FAUSTIN: Yeh. Sure. We're not there to harass. Maybe some people are, but this Bill will not stop them. We're giving true medical information, and this is affected by this Bill. Now, to close up with, to finish up with my Kirby Vacuum salesman, there's times talking to a woman that you might walk up to her and say, "Can I give you some literature?" "I'm not interested." Okay? So there's no consent. According to this, that's the end of the conversation or you risk six months in jail. Next question, "Well, do you know there's alternatives?" "I'm not interested." "If you need financial help, there's help available." "I'm not interested." Next question: "Well, what do you mean." "You mean you can help me in this way." And then, a conversation begins. But it didn't happen on the first time. Is that harassment? Is that something that should be stopped by law? To have a meaningful conversation that might take a couple questions? Might take a few steps down the sidewalk to get to that point where the woman realizes you have

something that she wants? She's not going to get it inside. The only way she's going to get it is if she's given it on the way in. Thank you.

CHAIR: Mr. Faustin, you indicate that you are a member of Operation Rescue.

FAUSTIN: Well, I'm a spokesman for Operation Rescue, Colorado.

CHAIR: And do you participate in their activities?

FAUSTIN: I have, yes.

CHAIR: It's been indicated here today by the persons opposing this Bill that all of the, the approaches, the words, everything are very calm and courteous and they're stopped immediately if people don't want them. Do you feel that's the way Operation Rescue works?

FAUSTIN: Well, there's a couple facets to Operation Rescue. One if we're talking about the typical rescue situation, that's one thing - where people are sitting, blockading the door. People have opinions about that. Another is picketing, sidewalk counselling.

CHAIR: And that's only in a very courteous, restrained manner?

FAUSTIN: By Operation Rescue, yes. And I might add that Operation Rescue has not been involved in what goes on at 20th and Vine. We haven't done anything there for over two years.

CHAIR: Where do the things that I see on TV? Those don't look very calm and non-violent to me. How, how, are those staged, or are they not real? Are there not that kind of activity, is there not that kind of activity going on?

FAUSTIN: Well, I'm not sure exactly, specifically what you're talking about.

CHAIR: Well, how 'bout Topeka the last couple years ago or last summer, the pictures we saw? Was it Wichita? wherever it was, those pictures were very violent.
FAUSTIN: I'm not sure what you're talking about. I don't know any. I was in Wichita. I know of no violence. I
CHAIR: Oh.
FAUSTIN: Was there anyone charged with assault?
CHAIR: I don't know. I just saw some things on TV that did not quite go along with what I'm hearing today, and I thought they were Operation Rescue. And was that all within 100 feet of the door and within 8 feet of the person?
CHAIR: It appeared to be very close.
FAUSTIN: Well, anyway, I don't know what you're specifically talking about, but as I said, and I say to the Committee, think of the impact of this on meaningful conversation.
CHAIR: I think we're having meaningful conversation. We're at about 8 feet apart.
GROFF: Madam Chairman.
CHAIR: Senator Groff.
GROFF: If someone says to you they don't want to discuss their decision, how can you characterize that as a meaningful conversation if you're talking and they don't want to talk? It's only meaningful to you, perhaps, but not meaningful conversation if one person says, "I'd rather not discuss this." How can you characterize that as a meaningful characterization?
CHAIR: Mr. Faustin.
FAUSTIN: Well, I guess I'd go back to my analogy of a salesman. I mean, have any salesmen been charged with harassment because they're persistent?
GROFF: Well, they might if (inaudible). Your father allowed the Kirby. By the way, I sold Kirbys in college.

LAUGHTER
GROFF: I sold two.
LOTS OF LAUGHTER
That's why I became a teacher, not a salesman. But, you know, your folks allowed the salesman in, and the salesman would have been in serious trouble if your father had asked him to leave and he had chosen not to leave and your father had called the police. Right? Because he then would be, he would be, be all the different charges that, that I'm sure that, many, that he would have been violating if he had stayed after you asked him to leave. (Inaudible) invited him in, and when someone says to you when they go into a clinic, "I don't want to talk to you," isn't that, isn't that enough? and don't you become an harasser after you, after they say, "I don't want to talk to you?"
CHAIR: Mr. Faustin.
FAUSTIN: I don't think so. And the reason is because, I mean, as I said, in that analogy, I mean, you're, you might be persistent, because you're trying to find out, you know, even the abortion industry talks about abortion being such a difficult decision, and I think it was Kate Michaelman who said, "No woman wants an abortion, but she gets an abortion like an animal with its leg in a trap that chews its leg off." And we're there to try to help open the trap, rather than have her have to chew her leg off. So, she sees herself in a very difficult situation with no other way out. And, maybe, she's never had contact with a pro-lifer, and so she thinks, "Oh, yeh, I've heard about these kind of people, you know. They're just here to tell me I'm going to Hell or, you know, something like that." But what if we have what that woman wants and after a few seconds or a few minutes of conversation, she changes her mind, and many have. There's so many women that could be here today to testify of a situation like that. So, was that

harassment? Was that wrong to persist? And you could harass someone in that situation. Sure, you could. But if you're there for honest, genuine help to that person, then that's not harassment.

GROFF: Except that it's their choice to either accept what you have to offer or reject it and from which time, I think, you are then required to leave them alone, and not bother them. Once they said, "Thank you but no thank you " that should be all that they have to do to get you away from them. And I think I hear you sayin', "No. I have a right to continue after they've said, 'Don't continue, '" and I think that's where I have trouble with, you know, with your testimony. You're saying that you should have a right to continue to harass them when once they've told you they're not interested which is, I think, all any person should have to say to anyone else when he's approached by someone, and that is, "I, I'm not interested."

FAUSTIN: May I answer that? Then, why don't we pass a law against Kirby Vacuum salesmen that after the first time the customer says, "I don't think I'm interested in this," the guy has to leave?

GROFF: He does.

CHAIR: He does.

GROFF: He does.

(Inaudible)No, he sold two vacuums.

LOTS OF LAUGHTER

FAUSTIN: You know, the truth is, some people would throw you out of their home, but a lot of people would just sit there, and salesmen know that. They'll keep going.

CHAIR: Thank you. Connie Anderson.

ANDERSON: Thank you, Madam Chairman. This is quite an act to follow, I'll have to admit. I represent the National Organization for Women, and I speak for all the members in

the State of Colorado. I also speak, I am the official spokesperson for the National Organization for Women, and I am the State Coordinator. I would like to also speak for the many representatives from our organization that have staffed barricades. I have been rather intrigued over the many people who seem so benevolent, or so benign, who testified up here, when it has been my experience both here and working as an escort in the Denver area, and, also, in Wichita. I was there, and there was nothing kind or benevolent about it. The law recently has stated that when a woman says no to a man as far as sexual assault is concerned he'd better accept that. Now, I think maybe there is a parallel to be drawn here that when a woman says no, I do not care to hear anything about this subject that no should be respected. I'm not going to belabor all of the issues that have been brought up. You' ve spent many long hours here. I will indeed make my testimony short but I want to reaffirm our position from the NOW organization in Colorado that we would appreciate and support your vote in favor of 1209. Thank you.

CHAIR: Thank you. Are there questions? That is everyone who signed up. Senator Feeley, would like to sum up?

FEELEY: Yes, and I will be brief. I thank the Committee for their patience throughout this afternoon in the hearing and I know that the Committee received a lot of written information one of which was a report from the Bill of Rights Committee of the Colorado Bar Association which examined the constitutionality of this statute and found that indeed it was constitutional. Ah, I think that case after case where a similar Bubble Ordinance has been tested, that the courts have uniformly found that these similar statutes are constitutional and I also think that the point was very well made by Ms. Perkins who stood here at least, excuse me, everyone on this

Committee is at least 8' away from her and I think everyone heard her offer of a solicitation of a handbill and everyone had the opportunity to make the decision as to whether or not they wanted to receive that handbill or whether they did not want to. I think that the 8' restriction is a very reasonable restriction and doesn't impede any education, it doesn't impede any discussion, I think that this bill is very carefully drafted balance of the constitutional rights and I would ask for a favorable vote on House Bill 1209. Thank you.

CHAIR: Are there questions? Comments? All right. Then the bill is on the table.

MAN: Can I look at the materials before

CHAIR: We'll take a 5 minute recess.

HOPPER: Senator Wham, can I ask you one thing?

CHAIR: Senator Hopper.

HOPPER: I would just like to say to whoever it was that said that we weren't picking this up, there, the things that we did pick up, I believe, were handed to the staff and he passed them out. These were not handed to the staff. They were just left on the table. So, it's not that we were ignoring it. It's just that there's a way of doing things.

UNIDENTIFIABLE: I was refused the right to hand that to a staff member.

CHAIR: As they are being passed out, we will take a 5-minute recess - 5 minutes only.

- - - RECESS - - -

CHAIR: Thank you. House Bill 1209 is on the table. Senator Hopper.

HOPPER: I move the Bill.

CHAIR: Are there comments, questions, amendments? Senator Lacy.

LACY: Thank you, Madam Chairman. I would like to make a couple of comments. You've all (inaudible) getting a little intense earlier in this discussion, but I, I would like to. This is, this is the position that I started out when 1209 came out. As the sponsor knows, I was in opposition to, as I stated earlier, the pro-life, pro-choice, proabortion issue is something that is really, really starting to wear on me. I have a great deal of respect for those of you who are sidewalk counsellors. I think that the job that you're doing is very well. The problem is, is the type of people that are not here, in this audience today, that is causing the problem, and if you were just in the process of handing out leaflets or trying to help somebody like this beautiful young woman who had the opportunity to have her baby, and it was through the help and the guidance of you, you know, that's a marvelous experience. She had the opportunity to accept or reject. The last gentleman talked about harassment and whether or not we believe that harassment was the major part of this and if we did, that in fact this Bill was probably a good idea, and I just want to share with you for a minute. You know, I don't know that I'll get anywhere with you, and it's probably a useless cause, but I guess I need to just, to just try to do it, because the people that have called me during my campaign once they found out I was a pro-choice candidate and what I went through, not being pregnant, not looking to have an abortion, and winding up having to hang up on people, winding up having to have other people drag me out of a middle group that has surrounded me and just hammering me with, you know, comments after comments. You know, I wasn't physically abused. This is true. But I considered it harassment, and moving around and trying to keep an objective viewpoint. And that's the one thing with 1209 that I have tried to do is keep an objective viewpoint. I don't know that this Bill has

anything to do with abortion. Unfortunately, we've all interjected it into this. I, uh, when you look at the people that are going to these clinics, and it's not the pro-lifers, it's the pro-choice people, too. We've got people on both sides of the aisle that spend time at those clinics that are harassing, in fact, those people who are going to those clinics for a variety of reasons. I would just ask you to, to think about this in another vein, and you may not be the ones that are doing the harassing, but then if you're wanting to carry on your cause, you need to try to identify some of those people that are, so we can pull 'em back and let some of the jobs that need to be done, because we wouldn't be here today if there wasn't harassment that is taking place in front of these clinics.

CHAIR: Senator Ruddick.

RUDDICK: I'll be brief. It never ceases. (Several minutes of inaudible testimony.)

CHAIR: Any comments. Senator Mutzebaugh.

MUTZEBAUGH: Well, I think it's a hard case, and I would hope that pro-life people who are like the pro-life people here today continue to do the work they're doing, 'cause I think it's important and I do think that it may make a difference. I think education is the real difference, and I think understanding each other is a difference, too. I mean, as a Christian, I know there are people that don't do things right all the time, and we've got to forgive them and try to convince them to do a better job, and so I, I would hope that, that this Bill brings people together and not push 'em apart. I don' t want to vote for anything that would help fund abortions at the state level or at the federal level, and I don't want to do anything else that pushes abortions in any way whatsoever, but then, again, if people want to make a choice, I think they, they deserve the right to decide what they need to do, and I think the more information they get, the better

off they are, and we should somehow encourage people to take information on both sides of this issue, somehow. I know the Hare Krishnas are always approaching me at the Airport, so I' ve had a lot of experience with people who come up and hand you things, and, so, we probably all have. If you want to take it, that's one thing. If you don't, I suppose you could say you don' t want it, so I think there is some choice out there but, and I don't know that this will change the choice one way or the other. I hope not. I hope people will still continue to work to do the right thing for what they believe. That's probably all I have to say on the subject.

CHAIR: Anyone else? Staff, call the roll.

CLERK: Senator Cassidy?

CASSIDY: Aye.

CLERK: Senator Groff?

GROFF: Aye.

CLERK: Senator Hopper?

HOPPER: Aye.

CLERK: Senator Lacy?

LACY: Aye.

CLERK: Senator Mutzebaugh?

MUTZEBAUGH: Aye.

CLERK: Senator Pastore?

PASTORE: Aye.

CLERK: Senator Ruddick?

RUDDICK: Aye.

CLERK: Senator Blickensderfer?

BLICKENSDERFER: Aye.

CLERK: And Madam Chairman?

CHAIR: Aye.

CHAIR: The Bill passes 9 to zero. Thank you all.

CHAIR: House Bill 1209

STAFF: House Bill 1209, Representative De Gette and Senator Feeley. Concerning the protection of a person's access to health care facilities.

CHAIR: Senator Feeley.

FEELEY: Thank you Madam Chair. We're having an interesting day this morning.

CHAIR: Keep it faster here.

FEELEY: Members, House Bill 1209 is a bill that has generated a great deal of interest, but actually, not a lot of controversy. This is a bill, which when you read it I'm sure you will agree is actually limited in scope. This is not a bill about abortion. This is not a bill about First Amendment rights. This is a bill about simply walking up a sidewalk to a healthcare facility to seek counselling or treatment and it's a matter of common courtesy. All of us are familiar with what's occurred at some of the healthcare clinics throughout the country. The violence that we saw in Wichita two summers ago, the tragic shooting that we saw just last week in Florida, in Pensacola. This is a problem that seems to be escalating around the country. House bill 1209 is a bill which is based upon two ordinances, one in the City of Boulder, one in Denver. The one in Boulder has been in place since 1986, has survived a constitutional challenge in the federal courts here in Colorado and I believe that both ordinances have gone a long way to stem the increasing confrontations that happen outside of healthcare facilities. Let me get to the bill. Section 1 of the bill has really two provisions. The first provision creates, says that a person commits a class III misdemeanor if that person knowingly obstructs, detains, hinders or impedes another's access to a healthcare facility. The second part of the bill creates what we've been referring to as the bubble. The second part creates

a zone, an 8 foot zone around a person approaching a healthcare facility, approaching or exiting a healthcare facility, and provides specifically that a person commits a Class III misdemeanor if, within 100 feet of the front door of a healthcare facility, someone approaches within 8 feet, without consent. Now let me just describe 8 feet. If Senator Wells leaned back in his chair, the distance from me to Senator Wells, as he's doing at the moment, is about 8. I suspect that if Senator Wells had a point to make from that distance he'd be able to make that point very well.

WELLS: Thank you.

FEELEY: And he does regularly. That's correct. That's about the 8 feet distance that we're talking about in this bill. The most important part of this section of the bill, however, involves the consent. We're stepping it off right now. That's about right. And I'm certain that if Senator Schroeder had a point to make, he could certainly make his point. The most important aspect of this part of the bill, however, involves the consent. If someone is approaching a healthcare facility and consents to a discussion, reaches out to obtain a handbill, consents to engage in a discussion, consents to read a sign, whatever, then that consent is given and no misdemeanor is committed.

Section 2 of the bill creates a civil remedy. That is that damages or injunctive relief would be appropriate if someone violates, excuse me, prohibits or hinders the access or exit from a healthcare facility. I want to make it clear that this civil remedy does not extend to an evasion of the 8 foot bubble. It only deals, when there's an actual hindrance to the health care facility, when someone stands in the way. This bill is not the bill that's going to prevent the type of tragedies that occurred in Florida last week.

It might prevent, however, something from escalating into that kind of tragedy. It's going to prevent that "in your face" that an unwilling listener might not want to engage in. We in fact had an incident in the Senate Judiciary Committee hearing where someone who came to speak against the bill presented all the members with a card. On the back of the card was a message and when you turned the card over there was a photograph. An absolutely horrendous photograph. Not one of the members of the committee had a choice. All of a sudden it was in their face, and this bill is designed to prevent that sort of communication. When a speaker's interest conflicts with those of an unwilling listener, the right of every person to be let alone has to be placed on the scales of the right of others to communicate. That's what this bill does. I believe it's a carefully balanced well-drawn bill that protects both the right of the speakers to communicate and protects the right of people seeking medical care and counselling to approach a healthcare facility. If I haven't already, I would move House Bill 1209 and I would request there were no committee amendments and I would request its favorable adoption.

CHAIR: The motion is before us. Members, is there any discussion? Senator Roberts.

ROBERTS: Thank you. In order to discuss this bill, we're going to get closer than 8 feet here, Senator Feeley, but I have some real constitutional problems with what you're doing here and I don't believe this will pass constitutional muster. There are numerous cases decided by the Supreme Court that go back for quite a number of years that protect the right to distribution, distribute leaflets on public ways and if that's a form of free speech protected by the First Amendment then you've got to have some kind of compelling reason for restricting the right of free speech, and particularly when you're talking about

restricting the right of free speech, which includes distribution of pamphlets, on a public thoroughfare, a public sidewalk. So, even if you were inside an airport there would be certain tests to be passed in order to restrict the right of free speech, but I don't find any compelling state interest in restricting the right of free speech on a sidewalk in front of a healthcare facility.

CHAIR: Senator Feeley.

FEELEY: Thank you. Senator Roberts, certainly First Amendment rights are of paramount importance but courts have recognized for a great period of time that free speech is not absolute, as what I mentioned before, when a speaker's interest conflicts with those of an unwilling listener, we've got to have a balancing test here. What we're dealing with is the right to be let alone, the right to not have something stuffed in our face. The right to be let alone, just as Brandeis said, is the most comprehensive of rights and the most valued by civilized men. I think he was right on that point. The reasonable time, place and manner restrictions on First Amendment rights was dealt with in a 1968 case, United States v. O'Brien, which came up in the context of the court finding that there is a reasonable restriction that could be imposed on people exercising their free speech rights by burning their draft card. And since that case has been decided, which set out the specific requirements that a court has to examine when looking at the Constitutional validity, cases have uniformly held that the type of restriction, a well-drafted, well-balanced restriction that insures the alternative means of communication, the courts have held that those are valid. In fact, the Boulder ordinance, in 1986, was challenged in the federal district court here in Denver and was found to pass constitutional muster. In the State of Washington, the Supreme Court of the State of Washington has upheld a 100 foot limit. That passed constitutional muster, and

I think that even Senator Wells would have a hard time making his point from a hundred feet away. He agrees.

In the City of San Diego, a similar ordinance was passed which placed sidewalk protestors 60 feet outside of the front door of a healthcare facility, and in fact put them across the street. And in each case, in fact uniformly, in each case, all of those ordinances which have been challenged have met Constitutional muster. I suspect that this one will and I really base that suspicion of Judge Weinshienk's decision with regard to the Boulder ordinance. I think this is a good bill that balances competing interests very well.

CHAIR: Senator Roberts.

ROBERTS: Well, I'm sure we'll find out. How do we determine whether or not someone has given consent?

CHAIR: Senator Feeley.

FEELEY: Well obviously that's a factual issue, but I'm glad you raised that point because, let me just answer that by way of analogy. In the Boulder ordinance, the consent specifically has to be oral consent. That is, there has to be an acknowledgement by the person that wants to receive the information that yes, I'd like to engage in a conversation. It has to be oral. This bill doesn't even go that far. This bill, the consent can be much more easily given, as I noted. If you reach out to accept a handbill, if you acknowledge that I'd like to engage in a conversation or sidewalk counselling, that's the consent that's appropriate. If I approach you to read a yard sign or any type of sign, that type of consent would mean the misdemeanor is not committed.

CHAIR: Senator Roberts.

ROBERTS: So, are we going to have a factual issue here in every case as to whether or not consent was given. Is that what we're going to do?

CHAIR: Senator Feeley.

FEELEY: Every case involves determination of factual issues, otherwise it's not a case. Yes.

ROBERTS: We're going to have this kind of nebulous, whether nor not consent was given, and if the person motioned to you or looked your way, perhaps that would constitute consent?

CHAIR: Go ahead, Senator Feeley.

FEELEY: Yes, I think that would be consent and therefore, I don't think a misdemeanor would have been committed. Yes.

CHAIR: Senator Roberts.

ROBERTS: Well suppose the person has a voter initiative relating to taxation in the State of Colorado and is trying to get signatures, what do they do? Stay away from healthcare facilities?

CHAIR: Senator Feeley.

FEELEY: I think that within the 8 foot you'd need to be careful, and if Senator Wells convinced me that he had a voter initiative and he'd like to speak to me about it and I consented to that, there's no problem with that.

CHAIR: Senator Roberts.

ROBERTS: Well I'd like to ask you, in order to warn people that they're near a healthcare facility and let's see, how close can, you have this 8 foot limit and how close are you to a healthcare facility when the 8 foot limit applies?

FEELEY: Madam Chair.

CHAIR: Yes.

FEELEY: Specifically, the bill provides that within 100 feet of the front door of the healthcare facility.

CHAIR: Senator Roberts.

ROBERTS: Well then what I'd like to propose as an amendment, is that we provide a large sign on the front of every

healthcare facility that warns people that if you're within 100 feet of this entrance, that you must stay 8 feet from anyone unless they give or grant their consent to you to give them a leaflet or talk to you. Would you accept such an amendment, Senator Feeley?

CHAIR: Senator Feeley.

FEELEY: Senator Roberts, frankly I don't think that is necessary. I think that the healthcare facilities are easily recognizable and well identified right now. I think that the application of the ordinance in Denver and Boulder, for at least 8 years in Boulder, that problem hasn't arisen. And I also think that, while this isn't necessarily limited to women's healthcare facilities, I think that the people who are doing sidewalk counselling outside of those facilities, have been well-educated, and it's worked very well, and I don't think that a sign would be necessary.

CHAIR: Is there any further discussion? Senator Roberts? Is there further discussion? Senator Feeley, wrap up.

FEELEY: Thank you. I would ask (inaudible).

CHAIR: Excuse me, there is. Senator Gallagher. Would you care to speak Senator Gallagher? The motion before us then is the adoption of House Bill 1209 on second reading. All those in favor please say aye. Opposed no. The ayes have it. 1209 is adopted on second reading.

END OF TAPE.

DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, the City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General for the State of Colorado; and the State of Colorado, Roy Romer,

Governor, and, pursuant to Rule 56, C.R.C.P., request that the Court enter summary judgment in their favor on all Claims for Relief set forth in the Verified Complaint. In support of this Motion, Defendants incorporate their Brief in Support of Joint Motion for Summary Judgment, which is being filed contemporaneously with this Motion, and further state as follows:

1. Pursuant to Rule 56(c), C.R.C.P., summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." In this matter, there are no genuine issues of material fact concerning the Plaintiffs' claims.

2. Section 18-9-122(3), 8B C.R.S. (1993 Supp.), limits speech only by imposition of reasonable time, place and manner restrictions, is neither vague, overbroad, nor an unlawful prior restraint on free speech and is, therefore, constitutional.

WHEREFORE, for the reasons set forth above and in the Defendants' Brief in Support of Joint Motion for Summary Judgment, Defendants request the Court to enter summary judgment in their favor and against the Plaintiffs on all claims for Relief set forth in the Verified Complaint.

AFFIDAVIT OF KATHERINE GALLOWAY

I, Katherine Galloway, being first duly sworn upon oath, state:

1. I am the office manager for Dr. Charles H. Gartner. Dr. Gartner's practice is in general obstetrics and gynecology, including the care of pregnant women; infertility counseling; routine gynecological checkups, including cancer screening through pap smears and colposcopy; treatments for abnormal

pap smears, to prevent the development of cervical cancer; and abortions. Abortions account for less than one percent of Dr. Gartner's practice. Dr. Gartner accepts Medicaid, and so has a number of low income patients.

2. Beginning in January of 1993, Dr. Gartner's office, located at 1145 S. Federal Boulevard in Denver, has been the target of antiabortion demonstrators almost every day. Initially, we had no security, and although the demonstrators trespassed in our parking lot and harassed the patients coming to our offices, it was difficult to obtain a police response in time to prosecute them under either trespass laws or the Denver "bubble" ordinance (Denver Code § 38-114, which requires that, within 100 feet of the entrance to a health care facility, a demonstrator must withdraw or step back eight feet from the person they are addressing if that person so requests).

3. Between January and August of 1993, the number of patient visits to our office dropped. I believe this was a direct result of the tactics employed by the demonstrators, who would surround patients cars' after they parked, and aggressively approach patients, sometimes yelling at them and thrusting signs or literature in their faces. Patients responded to the demonstrators by expressing fear for their physical safety or anger at the harassment.

4. Beginning in August of 1993, we have had to hire off--duty deputy sheriffs and install video cameras to monitor the parking lot and document violations of the bubble ordinance. We have also upgraded our alarm system and hired a security consultant. Since these measures, the demonstrators have kept out of the parking lot and have generally observed the bubble ordinance, knowing they will be prosecuted for violations. Since we have been able to enforce the laws, a number of patients have told me that they feel much better without the

demonstrators approaching them too closely. The number of patients canceling appointments due to fear of the demonstrators has decreased.

5. Since we instituted these security measures, demonstrators have continued to appear outside our offices. I have observed that the demonstrators, their signs, and the fact that some demonstrators offer literature can still be seen and heard from distances greater than eight feet.

6. Several patients coming to our office for prenatal care have told us that they will not return, although they have no problem with Dr. Gartner or his practice, because they do not want to endure harassment from the demonstrators. Dr. Gartner is one of the few obstetricians in private practice in Denver who takes Medicaid. Forcing patients away from our office may therefore limit their access to an obstetrical specialist.

7. I know Leila Jeanne Hill, and have observed her demonstrating outside our office. I have been able to hear her voice, read her signs, and see her waving leaflets at distances greater than eight feet.

8. I have personal knowledge of the statements contained in this affidavit, and I am competent to testify to the facts I have stated.

AFFIDAVIT OF WARREN M. HERN, M.D., M.P.H., PH.D.

I, Warren M. Hern, M.D., M.P.H., Ph.D., being first duly sworn upon oath, state:

1. I received my medical degree from the University of Colorado School of Medicine in 1965. I received a Master of Public Health degree from the University of North Carolina

School of Public Health in 1971, and I received my Ph.D. in Epidemiology from the same institution in 1988.

2. I specialize in two areas of medicine: outpatient abortion practice and epidemiology.

3. Exhibit A, attached to this affidavit, is a true and correct copy of my resume.

4. I maintain a private practice in outpatient abortion at the Boulder Abortion Clinic, 1130 Alpine, Boulder, Colorado.

5. My clinic has been the target of picketing and demonstrations since it opened in 1975. The demonstrations became more aggressive in 1985.

6. I observed that patients experienced considerably more stress when demonstrators were present, and the level of stress corresponded to the aggressiveness of the demonstrators. As explained in my paper, "Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations," attached as Exhibit B, social science research has shown that approaches by strangers closer than approximately three yards are stressful and are interpreted as a threat. I have observed a number of physiological symptoms in patients after they were exposed to aggressive demonstrating.

7. Patients would come in to my office shaking, tearful, and in great distress from harassment and insults, and from the fact that the demonstrators approached them very closely. Clinic staff would have to calm them down for some time, which often delayed their medical care.

8. Patients experienced a "fight-or-flight" reaction, especially when demonstrators approached closely. Patients exhibited evidence of this reaction, such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention. These reactions increased the difficulty and risk of administering medical treatment to the patients, as set

forth in more detail in my paper (Exhibit B).

9. Urinary retention made it difficult to perform a pelvic examination and accurately determine the size and condition of the patient's uterus, which is essential to safe completion of a surgical abortion.

10. Hyperventilation can lead to agitation and muscle spasms, making it more difficult for patients to stay still during medical treatment, and thus increasing the risks of complications such as perforating the uterus during the performance of an abortion.

11. In extreme cases, hyperventilation can lead to loss of consciousness, which is dangerous in and of itself, and which also increases the risk of complications during a surgical procedure such as an abortion.

12. Since 1987, section 5-3-10 of the Boulder Revised Municipal Code has required that demonstrators outside health care facilities must remain eight feet away from the person who is the target of their demonstrations, unless that person gives express oral consent for a closer approach.

13. Since passage of the Boulder ordinance, demonstrators have continued to appear outside my clinic. They can still be easily seen and heard, and patients still experience some level of stress from their presence. However, the ordinance shows the demonstrators that there is a line beyond which they cannot go, and allows the patients to obtain medical treatment without being subjected to the most aggressive and intrusive form of demonstrating. Because the patients are shielded from close physical confrontation, their stress levels are decreased and the medical risks posed by the presence of the demonstrators are also decreased.

14. I have personal knowledge of the statements contained in this affidavit, and I am competent to testify to the facts I have

stated.

AFFIDAVIT OF RUTH HOPFENBECK

I, Ruth Hopfenbeck, being first duly sworn upon oath, state:

1. I am a citizen of the United States and reside in the City and County of Denver, Colorado.

2. I am a member of the Board of Directors of Planned Parenthood of the Rocky Mountains.

3. I am also a volunteer patient escort at the Planned Parenthood medical clinic at 20th and Vine Streets, Denver, Colorado, for an hour to an hour and a half every Wednesday morning.

4. I have been a patient escort at the Vine Street Clinic for four years.

5. Escorts meet patients outside the clinic doors, and accompany them into the clinic. Our purpose is to get them into the clinic as fast as possible, while providing a buffer between the patient and the verbal assaults and physical intimidation by demonstrators outside of the facility.

6. On Wednesday mornings, there are usually five to fifteen demonstrators in front of the clinic, protesting the performance of abortions at the clinic.

7. In the City and County of Denver, § 38-114 of the Denver Code requires that, within 100 feet of the entrance to a health care facility, a demonstrator must withdraw or step back eight feet from the person they are addressing if that person so requests. Since passage of this ordinance in November of 1990, I and patients I have escorted have benefited from the ordinance.

8. On one occasion, while another escort and I were parking a patient's car, demonstrators surrounded the car, slapped

their signs against the windshield, and yelled at and taunted us. I was able to say, "Eight feet back, please," and they moved back so that I was able to move the car.

9. On another occasion, a patient and her mother were entering the clinic on foot. They were immediately surrounded by demonstrators, who shoved signs in their faces, and yelled at and taunted them. I and several other escorts quickly moved toward the mother and daughter. The young woman was in tears and her mother was shaking. We asked the demonstrators to stand back eight feet, which they did. We were then able to escort the patient and her mother into the clinic. Without the ordinance, we would not have been able to get the patient into the clinic without physical contact with the demonstrators.

10. Demonstrators at the Vine Street medical clinic yell and scream, calling patients, their family members, and escorts "murderers." They tell patients they are going to die, and taunt patients and their family members with inflammatory and abusive language, including racial epithets (such as "Mammy" directed at a black patient). These confrontational tactics are particularly stressful at close range.

11. It has been my experience that the eight foot buffer zone created by the Denver ordinance is effective in preventing physical contact between clinic patients and staff and the demonstrators outside of the Vine Street clinic. It creates a small zone of safety around patients seeking medical services at the clinic, and reduces the threatening and intimidating impact of the demonstrators' activities.

12. I have been able to hear the demonstrators, read their signs and observe that they are offering literature, all from distances greater than eight feet.

13. I have personal knowledge of the statements contained in this affidavit, and I am competent to testify to the facts I have

stated.

AFFIDAVIT OF NANCY JENKINS

I, Nancy Jenkins, being first duly sworn upon oath, state:

1. I am a citizen of the United States and reside in the City and County of Denver, Colorado.

2. Since 1988 to the present, I have volunteered as an escort at the Planned Parenthood medical clinic at 20th and Vine Streets, Denver, Colorado, for three to five hours a week.

3. During demonstrations outside the Vine Street clinic from 1988 through 1990, I had to physically assist patients, some no more than 12 or 13 years old, to force through masses of demonstrators in order to get into the clinic. Demonstrators jostled patients, screamed at them, and thrust signs and pamphlets in their faces. I was shoved and hit by demonstrators trying to reach the patients, but it was impossible to pick out the person responsible for the physical violence from the midst of the crowd. I found the demonstrators threatening and intimidating, and, judging by the patients' reactions, so did they. Patients would arrive in tears, shaking, or hanging on to me so hard they left marks.

4. I have also worked as a part-time employee for Planned Parenthood, phone counseling, making appointments and taking medical information from patients, before they arrive at the clinic, and after, for follow up which is required for all patients. Again, patients would arrive, become very emotionally upset, crying and shaking, due to the intimidation of all the demonstrators, and we would have to calm them down before they could receive medical treatment.

5. Since 1990 in the City and County of Denver, § 38-114 of the Denver Code requires that, within 100 feet of the

entrance to a health care facility, a demonstrator must withdraw or step back eight feet from the person they are addressing if that person so requests.

6. Since passage of the Denver ordinance, I have observed that demonstrators have continued to appear daily outside the Planned Parenthood Vine Street clinic, voicing their opposition to many of the services offered at the clinic. They carry placards, speak, and offer literature. I have been able to hear the demonstrators, read their signs and observe that they are offering literature, all from distances greater than eight feet.

7. The Denver ordinance has operated to give patients, volunteers and staff a buffer zone which lessens the intimidating and physically threatening aspect of the demonstrators' activities, at all medical and health care facilities, including hospitals and private offices. I would like to also state that as a person who has faced a life-threatening illness, I take comfort in having this ordinance to protect me when using any medical facility or hospital that may have demonstrators for any variety of reasons.

8. On one occasion, the ordinance allowed a mother who was picking up her daughter after a routine appointment to get demonstrators who had surrounded her car to move back so that, with the help of myself as a volunteer escort, she could safely enter the clinic parking lot.

9. I personally have used the ordinance to protect myself from intimidation and interference when I go out on the street to give directions and information to patients and their families.

10. I have also used the ordinance to decrease the likelihood of violence at the clinic. Demonstrators at the clinic taunt, threaten, and insult patients and their family members or friends. The family members or friends sometimes respond angrily. If the demonstrators are told to stay eight feet away,

that gives me a few seconds to step between the family member and the demonstrator, and defuse the confrontation before it becomes violent, protecting all parties involved including the demonstrators. The demonstrators often also use the ordinance against patients' family members and/or escorts.

11. In 1981, I had an abortion because I was on chemotherapy to treat life-threatening cancer. If I had been subjected to the intimidating, threatening behavior by demonstrators that I have witnessed as an escort when I went in for an abortion, it would have greatly increased the trauma and stress of that already traumatic experience. And I was lucky, as I was alerted by staff to be prepared in case there were demonstrators, so I would not have been taken totally by surprise.

12. I have personal knowledge of the statements contained in this affidavit, and I am competent to testify to the facts I have stated.

AFFIDAVIT OF DR. MARIANNE LA FRANCE

I, Marianne La France, being first duly sworn upon oath, state:

1. I am a permanent resident of the United States and a Canadian citizen and reside in the City of Gloucester, Massachusetts.

2. I graduated from and received a B.A. (Psychology) 1969 from the University of Windsor, Ontario, Canada. I received M.A. and Ph.D. degrees (Social Psychology) 1971 and 1974 respectively from Boston University.

3. I am presently a Professor of Social Psychology in the Department of Psychology, Boston College, Chestnut Hill, MA.

4. I have conducted research and published on the theory of

proxemics, the cultural use of space. (La France, 1978, 1979; Polit and La France, 1977)

5. I have been admitted and testified before the courts of this country as an expert witness concerning proxemic theory and research results, including the United States District Court far Colorado, (Buchanan v. Jorgensen, 1987).

6. I can state that there are appropriate distances for interactions in American culture and that they are specific and measurable. It is well known that intrusion at close distances are interpreted as threats, can be considered a hostile act, produce psychophysiologic reactions, such as stress, reduce communication and are often debilitating.

7. I can state that the scientific evidence, based upon research into the subject matter of proxemics indicates the following findings:

A close interpersonal approach by a stranger in a public setting is stressful. Interpersonal space is something that we need in order to protect ourselves. Close interpersonal distance is allowed to those people whom we know, whom we trust, and with whom the interaction is likely to be positive or at the very least neutral. The expectations are very clear that people are entering this mutually; they both agree to this spatial relationship.

As people approach more closely, there is increased eye contact and one is able to see facial expressions. One is able to detect the possibility of aggressive posturing. At close interpersonal distances, the effect is magnified and the stress reactions is proportionate. The effect of stress in an interpersonal context in which strangers are involved is monotonic: as distance lessens between people, stress increases.

Close interpersonal distance means violating the expected

norms for any interaction among strangers. We do, in a variety of subtle ways, give permission. If that permission is not granted, people feel violated. For example, as children age, as they grow up, the distances they adopt become greater.

8. I can further state that an individual would experience a sense of invasion if communication in which strangers are involved took place from less than 8 feet.

The first basic assumption is that strangers should adopt the furthest interpersonal distance that the physical environment allows. The second concerns the expectation of interaction. If I expect to have interaction with you, closer distances are allowed. If I do not expect and do not want interaction, the distance adopted will be further away and there will be a stress reaction if that distance is collapsed to less than where I feel comfortable.

A third factor is the tone of the interaction. A close interpersonal distance in a context which is negatively toned will exacerbate the stress already experienced.

Health and medical problems are matters that most Americans would describe as being of great privacy. Even in medical schools, nurses, doctors, and interns are instructed in order to be more sensitive to the distance adopted in providing health care.

Research indicates that 8 feet is not only sufficient in terms of communicating a verbal message; research results would probably recommend that specific distance. At distances of about 3 yards, there is greater influence, more openness, greater communication, and more comprehension of the message than at close interpersonal distance. Close interpersonal distance tends to create an arousal context within which the content of the message may not be heard

(Mehrabian & Williams, 1969).

There is some negotiation. Both people convey through a variety of verbal and nonverbal means that a distance is appropriate or inappropriate. If a distance is too close in one person's frame, there is stress and discomfort. The expectation in our culture is that at less than 3 yards, people begin to expect the possibility of tactile contact. That's why messages, typically nonverbal, are engaged in before 3 yards.

9. I have personal knowledge of the statements contained in this affidavit, and I am competent to testify to the facts I have stated.

AFFIDAVIT OF SUSAN MOSTOW

I, Susan Mostow, being first duly sworn upon oath, state:

1. I have volunteered as a patient escort at the Planned Parenthood medical clinic at 20th and Vine Streets, Denver, Colorado, for over four years. I am at the clinic for an hour to two hours every Wednesday.

2. When I first began escorting outside the Vine Street clinic, demonstrators would sometimes surround patients on the sidewalk, screaming at them from very close distances and thrusting signs and literature at them. Patients would respond by starting to cry, grabbing on to me, and expressing fear for their personal safety.

3. I personally felt physically threatened and intimidated to be surrounded by demonstrators at such close distances (less than a foot away).

4. Since 1990 in the City and County of Denver, § 38-114 of the Denver Code requires that, within 100 feet of the entrance to a health care facility, a demonstrator must withdraw

or step back eight feet from the person they are addressing if that person so requests.

5. Since passage of the Denver ordinance, I have personally observed demonstrators continuing to appear outside the Vine Street clinic. The demonstrators and their signs are still clearly visible and audible from distances greater than eight feet. From distances of eight feet or greater, I have been able to see that some demonstrators are offering literature. Since passage of the ordinance, some patients have taken literature from the demonstrators. My experience has been that it is impossible to ignore the demonstrators even when they are more than eight feet away.

6. Sometimes patients approach the clinic on foot, and I have gone out onto the street or sidewalk to escort them. I have informed the patients of the Denver ordinance and they have used it or I have used it to require the demonstrators to back up to a safer distance. Sometimes I have even informed patients inside the private parking lot about the ordinance. The patients express relief and approval to know that they have some protection.

7. Family members or friends accompanying patients sometimes respond angrily to the insults of the demonstrators, and I have had to physically restrain them from confrontations. It is easier to do this if the demonstrators are not right next to the family member or friend.

8. I have personal knowledge of the statements contained in this affidavit, and I am competent to testify to the facts I have stated.

PLAINTIFF LEILA JEANNE HILL'S RESPONSES TO DEFENDANTS' REQUESTS TO ADMIT

Comes the Plaintiff, Leila Jeanne Hill, by counsel, and answers the Defendants' Requests to Admit, as follows:

Request for Admission No. 1. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 18-9-122(3), Colorado Revised Statutes.

Admitted.

Request for Admission No. 2. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 5-3-10 of the Boulder Revised Municipal Code.

Admitted.

Request for Admission No. 3. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 38-114 of the Denver Revised Municipal Code.

Admitted.

Request for Admission No. 4. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance to health care facilities in the City of Boulder, Colorado since June 5, 1987.

Admitted.

Request for Admission No. 5. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance to medical or health care facilities in the city of Denver, Colorado since November 19, 1990.

Admitted.

Request for Admission No. 6. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance

to medical or health care facilities in Colorado since April 19, 1993.

Admitted.

Request for Admission No. 7. Admit that you have engaged in leafletting within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Admiitted, with the qualification that Plaintiff Hill has been compelled as a result of the adoption of C.R.S. § 18-9-122(3) to act with great caution and circumspection not previously required in that activity.

Request for Admission No. 8. Admit that you have engaged in displaying signs within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Admiitted, with the qualification that Plaintiff Hill has been compelled as a result of the adoption of C.R.S. § 18-9-122(3) to act with great caution and circumspection not previously required in that activity.

Request for Admission No. 9. Admit that you have engaged in oral protesting, educating or counseling within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Admiitted, with the qualification that Plaintiff Hill has been compelled as a result of the adoption of C.R.S. § 18-9-122(3) to act with great caution and circumspection not previously required in that activity.

Request for Admission No. 10. Admit that normal conversational tones are generally audible at eight feet from the speaker.

Denied, with the explanation that such conversational tones may, or may not, be audible depending on a variety of unstated circumstances, such as the level of other noise in the vicinity, and the hearing ability of the listener.

Request for Admission No. 11. Admit that loud speech such as shouting is generally audible at eight feet from the speaker.

Denied with qualification that such shouting may, or may not, be audible depending on a variety of unstated circumstances, such as the level of other noise in the vicinity, and the hearing ability of the listener.

Request for Admission No. 12. Admit that Section 18-9-122(3) does not preclude any speech outside an eight foot radius of any listener.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 13. Admit that Section 18-9-122(3) does not preclude any leafletting or handbilling outside an eight foot radius of any recipient.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 14. Admit that Section 18-9-122(3) does not preclude any displaying any signs outside an eight foot radius of any other person.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 15. Admit that government has an interest in securing access to health care for its citizens.

Denied, with the explanation that the requested admission does not define "access" and it does not define "health care;" and with the further explanation that the government of the

State of Colorado has a variety of other interests, explicitly established in the Constitutions of the United States and of Colorado, which are directly jeopardized by the enactment and threatened enforcement of C.R.S. § 18-9-122(3).

Request for Admission No. 16. Admit that the fact that an individual is displaying a sign may be seen from eight feet away.

Admiitted, with the qualification that such a fact may or may not be observable depending on a variety of unstated circumstances, such as the visual acuity of the observer and the existence of obstructions to the line of sight of the observer.

Request for Admission No. 17. Admit that signs with sufficiently large print may be read from eight feet away.

Admitted with the qualification that there are various unstated circumstances which would affect visibility and readability of print at such distances, such as the visual acuity of the observer and the existence of obstructions to the line of sight of the observer.

Request for Admission No. 18. Admit that the fact that an individual is offering literature or a leaflet may be seen from eight feet away.

Admiitted, with the qualification that there are various unstated circumstances which would affect observability of such conduct at such distances, such as the visual acuity of the observer and the existence of obstructions to the line of sight of the observer.

Request for Admission No. 19. Admit that the attached copy is a true and accurate transcript of the hearings and debate before the Colorado General Assembly on the passage of Section 18-9-122(3).

Denied. The Plaintiff lacks the capacity to testify to the authenticity of this document.

Request for Admission No. 20. Admit that Section 18-9-122(3) does not authorize any person or entity, including government officials or entities, to prohibit or restrict leafletting, picketing, or oral protest, education or counseling, unless that person is the target of the leafletting, picketing or oral protest, education or counseling.

Denied.

Request for Admission No. 21. Admit that Section 18-9-122(3) does not authorize any government officials or government entity to prohibit or restrict the printing or preparation of any written material.

Admiitted, with the qualification that printing and preparation of handbills is a fruitless exercise in the circumstances created by the imposition of C.R.S. § 18-9-122(3).

Request for Admission No. 22. Admit that Section 18-9-122(3) does not authorize any government officials or government entity to seize any written materials.

Denied. Seizure of evidence of the commission of a crime, to wit, distribution of literature without consent being obtained at greater than eight feet distance, is, on information and belief, a standard police practice and procedure.

Request for Admission No. 23. Admit that Section 18-9-122(3) does not authorize any person or entity, including government officials or government entities, to prohibit or restrict the distribution of written materials, unless that person is the target of the distribution of written materials.

Denied. The statute, as written, prohibits a distributer of materials from handing out literature within eight feet of another person without the consent of that person.

PLAINTIFF LEILA JEANNE HILL'S RESPONSES TO DEFENDANTS' INTERROGATORIES AND REQUESTS TO PRODUCE

Comes the Plaintiff, Leila Jeanne Hill, and tenders her answers to the Defendants' interrogatories as follows:

Interrogatory No. 1. If you have denied any of the requests for admissions above, and if you have not already done so in making that denial, please identify all facts relied upon by you in making the denial and identify all persons known to you who have knowledge of those facts.

See the responses to requests for admission separately served.

Interrogatory No. 2. Please identify each and every individual or individuals answering each of the interrogatories, requests for admission and requests for production. Identify the interrogatory, request for admission or request for production to which each individual or individuals provided information utilized in the response.

Leila Jeanne Hill and James M. Henderson, Sr.: all requests to admit; all requests to produce; all interrogatories.

Interrogatory No. 3. Please identify each and every person consulted or assisting in answering these interrogatories or requests for admissions or in gathering the documents requested below.

James M. Henderson, Sr. and Everitt W. Simpson, Jr.

Interrogatory No. 4. Please identify all experts you intend to call at the trial of this matter. Your response should include, but should not be limited to: (1) a brief summary of the experts' qualifications; (2) a summary of the experts' anticipated testimony; (3) the substance of the facts and opinions on which the experts are expected to testify; and (4) a summary of the grounds for each opinion.

No expert witness has been identified at this time. As soon as an expert has been so identified this response will be supplemented.

Interrogatory No. 5. Please identify all witnesses you intend to call at the trial of this matter. Your response should include, but should not be limited to, a brief summary of the witness' anticipated testimony.

Leila Jeanne Hill, Audrey Himmelmann, Everitt W. Simpson, Jr.: Each will testify as to their free speech activities in the vicinity of abortion businesses in the State of Colorado, and the impact of C.R.S. § 18-9-122(3) on those activities.

Other witnesses have not been identified at this time. If, and as soon as such witnesses are identified, this response will be supplemented.

Interrogatory No. 6. Please identify all individuals who have knowledge of the facts and circumstances at issue in this matter.

The Plaintiffs and the Defendants have such knowledge. The members of the state assembly who sponsored the bill which created C.R.S. § 18-9-122(3) have such knowledge. Pro-life and pro-abortion activists across the State, on belief, have information about the facts and circumstances of this matter.

Interrogatory No. 7. In Paragraph 34 of the Complaint, you allege that, by operation of federal law, Section 18-9-122(3) does not apply to labor activities. Please describe, in specific detail, the federal law that precludes application of Section 18-9-122(3) to labor activities.

Title 29 U.S.C. §§ 152, 153, 158, 160.

Interrogatory No. 8. In Paragraph 35 of the Complaint, you allege that, by operation of Colorado law, Section 18-9-122(3) does not apply to labor activities. Please describe, in specific

detail, the Colorado law that precludes application of Section 18-9-122(3) to labor activities.

C.R.S. §§ 8-3-104 *et seq.*, the "Labor Peace Act."

Interrogatory No. 9. Please state whether you have ever carried any signs while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint. If so, for each sign, state the size of the sign, the size of the lettering thereon, the size of any illustrations or pictures thereon, and the method for carrying or displaying the sign.

In lieu of a description thereof, Plaintiff Leila Jeanne Hill will produce one of each such sign for inspection and copying with the documents responsive to Defendants' Requests to Produce.

Interrogatory No. 10. Please state how far or close you physically came to a listener or recipient while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint before Section 18-9-122(3) became law.

The distance varied depending on the responses I received. On some occasions, I had walked side by side with people; on other occasions, I was at a greater distance.

Interrogatory No. 11. Please state how far or close you physically came to a listener or recipient while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint since Section 18-9-122(3) became law.

Without consent explicitly requested and received, I do not come within eight feet of a listener or recipient, to the best of my ability to judge that distance.

Interrogatory No. 12. Please state whether you have requested permission from any listener within 100 feet of the entrance to a health care clinic to come closer than eight feet from such person since Section 18-9-122(3) became law. If yes, for each instance, identify: (a) how you requested permission, including

what you asked the listener; (b) the verbal or physical response of the listener, and (c) whether you came within a distance of eight feet or closer from that listener after the response.

I have requested permission of listeners since C.R.S. §18-9-122(3) became law. I have no specific recollection of dates and times. In the circumstances in which I have requested permission, I have typically asked, "could I talk with you for a minute?' or something similar to that. The responses have varied: some have said yes, some have said no, and some have said nothing. When permission was granted, by word or gesture, I have approached closer than eight feet to the listener.

Interrogatory No. 13. Please identify any verbal or written comments made to you or in your presence by any member of law enforcement concerning the limitations imposed upon your speech or activities by Section 18-9-122(3), C.R.S., Section 5-3-10 of the Boulder Revised Municipal Code, or Section 38-114 of the Denver Revised Municipal Code. For each identified comment, please state:

a. The name and job title of the person making such comment.

b. The date and time that the comment was made.

c. The place where the comment was made.

d. The names and addresses of any other person hearing or seeing the comment.

e. The circumstances existing at the time the comment was made.

f. Your reaction to the comment at the time it was made, if any.

None.

Interrogatory No. 14. Please state specifically now, if any, your sidewalk counseling activities have altered or changed since Section 18-9-122(3) became law.

Prior to the enactment of C.R.S. § 18-9-122(3), I was not compelled to spend my time worrying about whether I was within 100 feet of an abortion business entryway, or whether I was being approached closer than eight feet by someone whose consent I would need to continue engaging in my free speech activities. Prior to the enactment of the statute, I was not under a continuous cloud of threatened criminal prosecution for offering literature to the public, displaying posters for all to see, or orally educating, counselling or protesting against abortion. As a consequence of the statute, I must now approach all these activities with great caution and circumspection.

PLAINTIFF LEILA JEANNE HILL'S RESPONSES TO THE REQUESTS FOR PRODUCTION OF DOCUMENTS

Request for Production No. 1. Produce copies of all documents identified, relied upon or referred to in responding to the interrogatories and requests for admissions set forth above.

There are no such documents, other than the legislative transcript provided by the defendants.

Request for Production No. 2. Produce copies of all documents which you intend to rely upon or introduce as exhibits at the trial of this matter.

The list of exhibits to be used has not been finalized at this time. The documents hereinafter described will, in all likelihood be used, and when any additional documents are identified, this answer will be supplemented.

The documents attached to the motion for preliminary injunction have already been produced to counsel for the defendants. In addition, literature I use in my sidewalk counselling is tendered for inspection and copying in response

to the request to produce because it may well be offered at trial. The signs I have used are produced for inspection and copying as well.

Request for Production No. 3. Produce copies of all documents furnished to or produced by the experts identified in Interrogatory No. 4.

There are no such documents at this time.

Request for Production No. 4. Produce copies of all documents furnished to or produced by the witnesses identified in Interrogatory No. 5.

There are no such documents at this time.

Request for Production No. 5. Produce copies of all documents in your possession, custody or control which refer to or relate to the facts and allegations set forth in the Complaint.

The documents have already been provided to counsel for defendants (attached to the Motion for Preliminary Injunction are the only such documents at this time).

Request for Production No. 6. Produce copies of all documents in your possession, custody or control which were sent to or received from individuals who are not parties to this action, but which documents refer to or relate to claims of the unconstitutionality of Section 18-9-122(3).

There are no such documents.

Request for Production No. 7. Produce copies of all correspondence between yourself and any other plaintiff which in any way relates to this matter.

There is no such correspondence.

PLAINTIFF AUDREY HIMMELMANN'S RESPONSES TO DEFENDANTS' REQUEST FOR ADMISSIONS

Comes the Plaintiff, Audrey Himmelmann, and tenders her

responses to Defendants' Request for Admissions as follows:

Request for Admission No. 1. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 18-9-122(3), Colorado Revised Statutes.

Admitted.

Request for Admission No. 2. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 5-3-10 of the Boulder Revised Municipal Code.

Admitted.

Request for Admission No. 3. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 38-114 of the Denver Revised Municipal Code.

Admitted.

Request for Admission No. 4. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance to health care facilities in the City of Boulder, Colorado since June 5, 1987.

Denied, with the explanation that Plaintiff Himmelmann has travelled on some occasions to Boulder to picket at abortion businesses there, and while Plaintiff Himmelmann has no specific recollection thereof, it may be that I spoke with persons who were entering those businesses to offer them counsel.

Request for Admission No. 5. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance to medical or health care facilities in the city of Denver, Colorado since November 19, 1990.

Admitted.

Request for Admission No. 6. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance to medical or health care facilities in Colorado since April 19, 1993.

Denied. Plaintiff Himmelmann has not done so out of fear of application of C.R.S. § 18-9-122(3) through criminal prosecution.

Request for Admission No. 7. Admit that you have engaged in leafletting within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Denied. Plaintiff Himmelmann has refrained from doing so out of fear of application of C.R.S. § 18-9-122(3) through criminal prosecution.

Request for Admission No. 8. Admit that you have engaged in displaying signs within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Admitted.

Request for Admission No. 9. Admit that you have engaged in oral protesting, educating or counseling within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Admitted.

Request for Admission No. 10. Admit that normal conversational tones are generally audible at eight feet from the speaker.

Denied, with qualification that such conversational tones may, or may not, be audible depending on a variety of unstated circumstances, such as the level of other noise in the vicinity, and the hearing ability of the listener.

Request for Admission No. 11. Admit that loud speech such as shouting is generally audible at eight feet from the speaker.

Denied with qualification that such shouting may, or may not, be audible depending on a variety of unstated circumstances, such as the level of other noise in the vicinity, and the hearing ability of the listener.

Request for Admission No. 12. Admit that Section 18-9-122(3) does not preclude any speech outside an eight foot radius of any listener.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 13. Admit that Section 18-9-122(3) does not preclude any leafletting or handbilling outside an eight foot radius of any recipient.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 14. Admit that Section 18-9-122(3) does not preclude any displaying any signs outside an eight foot radius of any other person.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 15. Admit that government has an interest in securing access to health care for its citizens.

Denied, with the explanation that the requested admission does not define "access" and it does not define "health care;" and with the further explanation that the government of the State of Colorado has a variety of other interests, explicitly established in the Constitutions of the United States and of

Colorado, which are directly jeopardized by the enactment and threatened enforcement of C.R.S. § 18-9-122(3).

Request for Admission No. 16. Admit that the fact that an individual is displaying a sign may be seen from eight feet away.

Admiitted, with the qualification that such a fact may or may not be observable depending on a variety of unstated circumstances, such as the visual acuity of the observer and the existence of obstructions to the line of sight of the observer.

Request for Admission No. 17. Admit that signs with sufficiently large print may be read from eight feet away.

Admitted with the qualification that there are various unstated circumstances which would affect visibility and readability of print at such distances.

Request for Admission No. 18. Admit that the fact that an individual is offering literature or a leaflet may be seen from eight feet away.

Admiitted, with the qualification that there are various unstated circumstances which would affect observability of such conduct at such distances, such as the visual acuity of the observer and the existence of obstructions to the line of sight of the observer.

Request for Admission No. 19. Admit that the attached copy is a true and accurate transcript of the hearings and debate before the Colorado General Assembly on the passage of Section 18-9-122(3).

Denied. The Plaintiff lacks the capacity to testify to the authenticity of this document.

Request for Admission No. 20. Admit that Section 18-9-122(3) does not authorize any person or entity, including government officials or entities, to prohibit or restrict leafletting, picketing, or oral protest, education or counseling,

unless that person is the target of the leafletting, picketing or oral protest, education or counseling.

Denied.

Request for Admission No. 21. Admit that Section 18-9-122(3) does not authorize any government officials or government entity to prohibit or restrict the printing or preparation of any written material.

Admiitted, with the qualification that printing and preparation of handbills is a fruitless exercise in the circumstances created by the imposition of C.R.S. § 18-9-122(3).

Request for Admission No. 22. Admit that Section 18-9-122(3) does not authorize any government officials or government entity to seize any written materials.

Denied. Seizure of evidence of the commission of a crime, to wit, distribution of literature without consent being obtained at greater than eight feet distance, is, on information and belief, a standard police practice and procedure.

Request for Admission No. 23. Admit that Section 18-9-122(3) does not authorize any person or entity, including government officials or government entities, to prohibit or restrict the distribution of written materials, unless that person is the target of the distribution of written materials.

Denied.

PLAINTIFF AUDREY HIMMELMANN'S RESPONSES TO DEFENDANTS' INTERROGATORIES

Comes the Plaintiff, Audrey Himmelmann, and tenders her answers to the interrogatories of the Defendants as follows:

Interrogatory No. 1. If you have denied any of the requests for admissions above, and if you have not already done so in

making that denial, please identify all facts relied upon by you in making the denial and identify all persons known to you who have knowledge of those facts.

See Plaintiff Himmelmann's answers to requests to admit.

Interrogatory No. 2. Please identify each and every individual or individuals answering each of the interrogatories, requests for admission and requests for production. Identify the interrogatory, request for admission or request for production to which each individual or individuals provided information utilized in the response.

Plaintiff Himmelmann and James M. Henderson, Sr.: all requests to admit, interrogatories and requests to produce documents.

Interrogatory No. 3. Please identify each and every person consulted or assisting in answering these interrogatories or requests for admissions or in gathering the documents requested below.

James M. Henderson, Sr.

Interrogatory No. 4. Please identify all experts you intend to call at the trial of this matter. Your response should include, but should not be limited to: (1) a brief summary of the experts' qualifications; (2) a summary of the experts' anticipated testimony; (3) the substance of the facts and opinions on which the experts are expected to testify; and (4) a summary of the grounds for each opinion.

Not identified at this time but to be determined and announced as soon as so identified.

Interrogatory No. 5. Please identify all witnesses you intend to call at the trial of this matter. Your response should include, but should not be limited to, a brief summary of the witness' anticipated testimony.

Leila Jeanne Hill, Audrey Himmelmann, Everitt W.

Simpson, Jr.: Each will testify as to their free speech activities in the vicinity of abortion businesses in the State of Colorado, and the impact of C.R.S. § 18-9-122(3) on those activities.

Other witnesses have not been identified at this time. If, and as soon as such witnesses are identified, this response will be supplemented.

Interrogatory No. 6. Please identify all individuals who have knowledge of the facts and circumstances at issue in this matter.

The Plaintiffs and the Defendants have such knowledge. The members of the state assembly who sponsored the bill which created C.R.S. § 18-9-122(3) have such knowledge. Pro-life and pro-abortion activists across the State, on belief, have information about the facts and circumstances of this matter.

Interrogatory No. 7. In Paragraph 34 of the Complaint, you allege that, by operation of federal law, Section 18-9-122(3) does not apply to labor activities. Please describe, in specific detail, the federal law that precludes application of Section 18-9-122(3) to labor activities.

Title 29 U.S.C. §§ 152, 153, 158, 160.

Interrogatory No. 8. In Paragraph 35 of the Complaint, you allege that, by operation of Colorado law, Section 18-9-122(3) does not apply to labor activities. Please describe, in specific detail, the Colorado law that precludes application of Section 18-9-122(3) to labor activities.

C.R.S. §§ 8-3-104 *et seq.*, the "Labor Peace Act."

Interrogatory No. 9. Please state whether you have ever carried any signs while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint. If so, for each sign, state the size of the sign, the size of the lettering thereon, the size of any illustrations or pictures thereon, and the method for carrying or

displaying the sign.

In lieu of a description thereof, one of each sign so used will be produced for inspection and copying together with any documents responsive to the Requests to Produce.

Interrogatory No. 10. Please state how far or close you physically came to a listener or recipient while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint before Section 18-9-122(3) became law.

On occasion, I have walked side-by-side with a person who was interested in the educational and counselling information I had to offer. Where appropriate, on other occasions, I have walked at greater distances.

Interrogatory No. 11. Please state how far or close you physically came to a listener or recipient while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint since Section 18-9-122(3) became law.

Since the new law was adopted I have not approached closer than eight feet to listeners or recipients for fear of possible prosecution.

Interrogatory No. 12. Please state whether you have requested permission from any listener within 100 feet of the entrance to a health care clinic to come closer than eight feet from such person since Section 18-9-122(3) became law. If yes, for each instance, identify: (a) how you requested permission, including what you asked the listener; (b) the verbal or physical response of the listener, and (c) whether you came within a distance of eight feet or closer from that listener after the response.

I have not requested permission to approach closer than eight feet.

Interrogatory No. 13. Please identify any verbal or written comments made to you or in your presence by any member of law enforcement concerning the limitations imposed upon your

speech or activities by Section 18-9-122(3), C.R.S., Section 5-3-10 of the Boulder Revised Municipal Code, or Section 38-114 of the Denver Revised Municipal Code. For each identified comment, please state:

a. The name and job title of the person making such comment.

b. The date and time that the comment was made.

c. The place where the comment was made.

d. The names and addresses of any other person hearing or seeing the comment.

e. The circumstances existing at the time the comment was made.

f. Your reaction to the comment at the time it was made, if any.

There are no such communications.

Interrogatory No. 14. Please state specifically now, if any, your sidewalk counseling activities have altered or changed since Section 18-9-122(3) became law.

I have discontinued approaching within eight feet of listeners or recipients while I am closer than 100 feet of the entrances of abortion businesses, even though I could do so while remaining on public property. I have discontinued doing so directly as the result of fear of criminal prosecution for an alleged violation of C.R.S. § 18-9-122(3). At all times, I am compelled constantly to consider the 100 feet distance issue and the additional eight foot bubble distance, which concerns were created by the enactment of the statute.

PLAINTIFF EVERITT W. SIMPSON, JR., RESPONSES

TO DEFENDANTS' REQUESTS TO ADMIT

Comes the Plaintiff, Everitt W. Simpson, Jr., and responds to Defendants' Requests for Admissions as follows:

Request for Admission No. 1. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 18-9-122(3), Colorado Revised Statutes.

Admitted.

Request for Admission No. 2. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 5-3-10 of the Boulder Revised Municipal Code.

Admitted.

Request for Admission No. 3. Admit that you have never been cited, detained, arrested or referred for prosecution on a charge of violating Section 38-114 of the Denver Revised Municipal Code.

Admitted.

Request for Admission No. 4. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance to health care facilities in the City of Boulder, Colorado since June 5, 1987.

Denied.

Request for Admission No. 5. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance to medical or health care facilities in the city of Denver, Colorado since November 19, 1990.

Denied. Plaintiff Simpson discontinued sidewalk counseling at Denver abortion businesses earlier in 1990. On two occasions since then, once on Mothers' Day, 1991, and once in 1993, Plaintiff Simpson has been in the vicinity of a

Denver abortion business but did not engage in sidewalk counseling on those two occasions.

Request for Admission No. 6. Admit that you have engaged in and continue to engage in sidewalk counseling as defined in paragraph 18 of the Complaint within 100 feet of the entrance to medical or health care facilities in Colorado since April 19, 1993.

Denied.

Request for Admission No. 7. Admit that you have engaged in leafletting within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Denied. Out of concern for possible criminal prosecution, Plaintiff Simpson discontinued approaching closer than 100 feet of abortion businesses since the statute was adopted.

Request for Admission No. 8. Admit that you have engaged in displaying signs within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Denied. Out of concern for possible criminal prosecution, Plaintiff Simpson discontinued approaching closer than 100 feet of abortion businesses since the statute was adopted.

Request for Admission No. 9. Admit that you have engaged in oral protesting, educating or counseling within 100 feet of the entrance to a health care facility in Colorado since April 19, 1993.

Denied, with the qualification that, during the visit of the Pope to Denver, in August 1993, Plaintiff Simpson participated in an event called a Life Chain, at the Lutheran Hospital in Wheat Ridge, Colorado, which is a hospital where abortions are committed.

Request for Admission No. 10. Admit that normal conversational tones are generally audible at eight feet from the speaker.

Denied, with qualification that such conversational tones may, or may not, be audible depending on a variety of unstated circumstances, such as the level of other noise in the vicinity, and the hearing ability of the listener.

Request for Admission No. 11. Admit that loud speech such as shouting is generally audible at eight feet from the speaker.

Denied, with qualification that such shouting may, or may not, be audible depending on a variety of unstated circumstances, such as the level of other noise in the vicinity, and the hearing ability of the auditor.

Request for Admission No. 12. Admit that Section 18-9-122(3) does not preclude any speech outside an eight foot radius of any listener.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 13. Admit that Section 18-9-122(3) does not preclude any leafletting or handbilling outside an eight foot radius of any recipient.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 14. Admit that Section 18-9-122(3) does not preclude any displaying any signs outside an eight foot radius of any other person.

Admiitted, with the qualification that the existence of the statute and the potential for enforcement through criminal prosecution, is intimidating and compels the exercise of great caution and circumspection not previously required.

Request for Admission No. 15. Admit that government has an

interest in securing access to health care for its citizens.

Denied, with the explanation that the requested admission does not define "access" and it does not define "health care;" and with the further explanation that the government of the State of Colorado has a variety of other interests, explicitly established in the Constitutions of the United States and of Colorado, which are directly jeopardized by the enactment and threatened enforcement of C.R.S. § 18-9-122(3).

Request for Admission No. 16. Admit that the fact that an individual is displaying a sign may be seen from eight feet away.

Admiitted, with the qualification that such a fact may or may not be observable depending on a variety of unstated circumstances, such as the visual acuity of the observer and the existence of obstructions to the line of sight of the observer.

Request for Admission No. 17. Admit that signs with sufficiently large print may be read from eight feet away.

Admitted with the qualification that there are various unstated circumstances which would affect visibility and readability of print at such distances, such as the visual acuity of the observer and the existence of obstructions to the line of sight of the observer.

Request for Admission No. 18. Admit that the fact that an individual is offering literature or a leaflet may be seen from eight feet away.

Admiitted, with the qualification that there are various unstated circumstances which would affect observability of such conduct at such distances, such as the visual acuity of the observer and the existence of obstructions to the line of sight of the observer.

Request for Admission No. 19. Admit that the attached copy is a true and accurate transcript of the hearings and debate

before the Colorado General Assembly on the passage of Section 18-9-122(3).

Denied. The Plaintiff lacks the capacity to testify to the authenticity of this document.

Request for Admission No. 20. Admit that Section 18-9-122(3) does not authorize any person or entity, including government officials or entities, to prohibit or restrict leafletting, picketing, or oral protest, education or counseling, unless that person is the target of the leafletting, picketing or oral protest, education or counseling.

Denied.

Request for Admission No. 21. Admit that Section 18-9-122(3) does not authorize any government officials or government entity to prohibit or restrict the printing or preparation of any written material.

Admiitted, with the qualification that printing and preparation of handbills is a fruitless exercise in the circumstances created by the imposition of C.R.S. § 18-9-122(3).

Request for Admission No. 22. Admit that Section 18-9-122(3) does not authorize any government officials or government entity to seize any written materials.

Denied. Seizure of evidence of the commission of a crime, to wit, distribution of literature without consent being obtained at greater than eight feet distance, is, on information and belief, a standard police practice and procedure.

Request for Admission No. 23. Admit that Section 18-9-122(3) does not authorize any person or entity, including government officials or government entities, to prohibit or restrict the distribution of written materials, unless that person is the target of the distribution of written materials.

Denied. The statute, as written, prohibits a distributer of

materials from handing out literature within eight feet of another person without the consent of that person.

PLAINTIFF EVERITT W. SIMPSON, JR.'S ANSWERS TO INTERROGATORIES

Comes the Plaintiff, Everitt W. Simpson, Jr., and tenders his responses to Defendants' Interrogatories as follows:

Interrogatory No. 1. If you have denied any of the requests for admissions above, and if you have not already done so in making that denial, please identify all facts relied upon by you in making the denial and identify all persons known to you who have knowledge of those facts.

See Plaintiff Simpson's responses to the requests to admit.

Interrogatory No. 2. Please identify each and every individual or individuals answering each of the interrogatories, requests for admission and requests for production. Identify the interrogatory, request for admission or request for production to which each individual or individuals provided information utilized in the response.

Everitt W. Simpson, Jr. and James M. Henderson, Sr.: all requests to admit, interrogatories and requests to produce.

Interrogatory No. 3. Please identify each and every person consulted or assisting in answering these interrogatories or requests for admissions or in gathering the documents requested below.

James M. Henderson, Sr. and Leila Jeanne Hill.

Interrogatory No. 4. Please identify all experts you intend to call at the trial of this matter. Your response should include, but should not be limited to: (1) a brief summary of the experts' qualifications; (2) a summary of the experts' anticipated testimony; (3) the substance of the facts and opinions on which

the experts are expected to testify; and (4) a summary of the grounds for each opinion.

No expert witness has been identified at this time. As soon as an expert has been so identified this response will be supplemented.

Interrogatory No. 5. Please identify all witnesses you intend to call at the trial of this matter. Your response should include, but should not be limited to, a brief summary of the witness' anticipated testimony.

Leila Jeanne Hill , Audrey Himmelmann, Everitt W. Simpson, Jr.: Each will testify as to their free speech activities in the vicinity of abortion businesses in the State of Colorado, and the impact of C.R.S. § 18-9-122(3) on those activities.

Other witnesses have not been identified at this time. If, and as soon as such witnesses are identified, this response will be supplemented.

Interrogatory No. 6. Please identify all individuals who have knowledge of the facts and circumstances at issue in this matter.

The Plaintiffs and the Defendants have such knowledge. The members of the state assembly who sponsored the bill which created C.R.S. § 18-9-122(3) have such knowledge. Prolife and proabortion activists across the State, on belief, have information about the facts and circumstances of this matter.

Interrogatory No. 7. In Paragraph 34 of the Complaint, you allege that, by operation of federal law, Section 18-9-122(3) does not apply to labor activities. Please describe, in specific detail, the federal law that precludes application of Section 18-9-122(3) to labor activities.

Title 29 U.S.C. §§ 152, 153, 158, 160.

Interrogatory No. 8. In Paragraph 35 of the Complaint, you

allege that, by operation of Colorado law, Section 18-9-122(3) does not apply to labor activities. Please describe, in specific detail, the Colorado law that precludes application of Section 18-9-122(3) to labor activities.

C.R.S. §§ 8-3-104 *et seq.*, the "Labor Peace Act."

Interrogatory No. 9. Please state whether you have ever carried any signs while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint. If so, for each sign, state the size of the sign, the size of the lettering thereon, the size of any illustrations or pictures thereon, and the method for carrying or displaying the sign.

Yes. In lieu of a description of these signs, those signs will be produced for inspection and copying together with documents responding to the Defendants' Requests to Produce.

Interrogatory No. 10. Please state how far or close you physically came to a listener or recipient while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint before Section 18-9-122(3) became law.

Typically, two or three feet.

Interrogatory No. 11. Please state how far or close you physically came to a listener or recipient while engaging in sidewalk counseling as defined in paragraph 18 of the Complaint since Section 18-9-122(3) became law.

Since the adoption of the statute, I have discontinued going within 100 feet of entrances to abortion businesses. Outside of that 100 foot distance, I have continued to approach within two or three feet of listeners/recipients.

Interrogatory No. 12. Please state whether you have requested permission from any listener within 100 feet of the entrance to a health care clinic to come closer than eight feet from such person since Section 18-9-122(3) became law. If yes, for each instance, identify: (a) how you requested permission, including

what you asked the listener; (b) the verbal or physical response of the listener, and (c) whether you came within a distance of eight feet or closer from that listener after the response.

No.

Interrogatory No. 13. Please identify any verbal or written comments made to you or in your presence by any member of law enforcement concerning the limitations imposed upon your speech or activities by Section 18-9-122(3), C.R.S., Section 5-3-10 of the Boulder Revised Municipal Code, or Section 38-114 of the Denver Revised Municipal Code. For each identified comment, please state:

a. The name and job title of the person making such comment.

b. The date and time that the comment was made.

c. The place where the comment was made.

d. The names and addresses of any other person hearing or seeing the comment.

e. The circumstances existing at the time the comment was made.

f. Your reaction to the comment at the time it was made, if any.

I received a written comment, in the form of a letter, from the City Attorney for the City of Lakewood, Colorado. The letter was responsive to two letters I had previously sent to the City Attorney, and one that I had sent to the Mayor of Lakewood. I received the letter by mail, and the letter was dated July 2, 1993. In his letter, City Attorney Noonan declared, "The Lakewood Police Department has been advised of the provisions of this new statute and is prepared to enforce its terms," and, "violations of this new statute will be instead prosecuted by the Office of the District Attorney, First Judicial District, 1726 Cole Boulevard, Building 22, Suite 300, Golden,

Colorado, 80401."

No other comments have been made.

Interrogatory No. 14. Please state specifically now, if any, your sidewalk counseling activities have altered or changed since Section 18-9-122(3) became law.

I have discontinued approaching within 100 feet of the entrances of abortion businesses, even though I could do so while remaining on public property. I have discontinued doing so directly as the result of fear of criminal prosecution for an alleged violation of C.R.S. § 18-9-122(3). At all time, I am compelled to consider the 100 feet distance issue and the additional eight foot bubble distance, which concerns were created by the enactment of the statute.

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Come now the Plaintiffs, Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., and, pursuant to Rule 56, C.R.C.P., request the Court to enter summary judgment in their favor on all claims for relief set forth in the Verified Complaint. In support of this Motion, Plaintiffs incorporate herein the attached affidavits of Leila Jeanne Hill, Audrey Himmelmann, Everitt W. Simpson, Jr., and William J. Brown, M.A., Ph.D., as well as their Brief in Support of Cross-Motion for Summary Judgment and in Opposition to the Defendants' Joint Motion for Summary Judgment, which is being filed contemporaneously with this Motion, and state further the following:

1. There are no genuine issues of material fact concerning the Verified Complaint and the facial defectiveness of C.R.S. § 18-9-122(3). Summary judgment is appropriate in these

circumstances pursuant to Rule 26 C.R.C.P., because "there is no genuine issue as to any material fact" and because the Plaintiffs are "entitled to judgment as a matter of law."

2. C.R.S. § 18-9-122(3) is facially unconstitutional, in that it is a classic prior restraint on freedom of speech and freedom of the press; and in that it operates directly to restrict and silence protected expression in traditional public forum properties near medical facilities; and in that it is a content-based restriction on oral protest, oral education and oral counseling, but lacks justification by any compelling governmental interest; and in that it is a viewpoint-based restriction on speech; and in that it is substantially overbroad; and in that it is unconstitutionally vague.

Wherefore, for the reasons set forth above and in Plaintiffs' Brief in Support of the Cross-motion for Summary Judgement, Plaintiffs respectfully pray that the court enter summary judgment in their favor, and against all Defendants on the Claims for Relief set out in the Verified Complaint.

[NOTATION

The Second Affidavit of Leila Jeanne Hill is substantially identical to the Affidavit of Leila Jeanne Hill, which is reproduced at page ___ of the Joint Appendix.]

[NOTATION

The Second Affidavit of Audrey Himmelmann is substantially identical to the Affidavit of Audrey Himmelmann, which is reproduced at page ___ of the Joint Appendix.]

[NOTATION

The Second Affidavit of Everitt W. Simpson, Jr. is substantially identical to the Affidavit of Everitt W. Simpson, Jr., which is reproduced at page ___ of the Joint Appendix.]

AFFIDAVIT OF WILLIAM J. BROWN, M.A., PH.D.

William J. Brown, M.A. Ph.D., being first duly sworn, upon his oath deposes and states as follows:

1. I am presently a Professor of Communication and Dean of the College of Communication and the Arts at Regent University, a fully accredited graduate institution in the state of Virginia. My responsibility is to oversee 17 graduate professors, a dozen adjunct faculty, and a current graduate enrollment of 240 Masters degree students and 30 doctoral students working toward M.A. and Ph.D. degrees in Communication and Journalism.

2. I received a B.S. Degree in Environmental Science from Purdue University in 1978, an M.A. in Communication Management from the Annenberg School for Communication at the University of Southern California in 1986, a second M.A. Degree in Communication from the College of Arts and Sciences at the University of Southern California in 1987, and a Ph.D. in Communication Theory and Research from the University of Southern California in 1988.

3. I am currently teaching as a Professor of Communication at Regent University in Virginia, and have taught as a full-time tenure-track faculty member at the University of Hawaii, as an Associate Professor of the University of the Nations in Hawaii, as an Adjunct Professor in the military education programs at

Pearl Harbor, Hickam Air Force Base, and Schofield Barracks on Oahu, Hawaii, as an Assistant Lecturer at the University of Southern California, and as an Adjunct Professor in a special education program at Maui Community College in Maui, Hawaii. I have lectured extensively in East Asia, and have been a guest speaker at universities in Japan, Korea, Thailand, and the Philippines.

4. In addition to my career as a communication scholar and university administrator, I have lived and worked overseas as a communication coordinator and administrator for an international non-profit organization providing refugee relief, education and training, and drug rehabilitation for refugees and the homeless in several nations in Asia, including Hong Kong, China, Thailand, the Philippines, Indonesia, Singapore, and India. As part of this work, I conducted communication seminars and taught on intercultural communication, made Hong Kong my home for five years and the Marianas Islands my home for one year, and travelled extensively throughout much of Asia.

5. Currently I am actively involved in teaching, consulting, and communication scholarship, which includes conducting original research, presenting scholarly research papers, and publishing in academic journals. My curriculum vitae is attached to this Affidavit as Appendix A.

6. In addition to my academic and administrative responsibilities, I am a communication consultant and am actively working with several large organizations to provide communication training and research.

7. My specific area of expertise is the study of how communication affects personal and social attitudes, beliefs, and behaviors, with a focus on media effects and social influence. I am currently completing a book manuscript on the

communication differences between Japanese and Americans, with a focus on nonverbal communication behaviors; and have started a second book on the international diffusion of one of the most popular animated television series for children in the history of television.

8. I have been asked to provide an expert opinion in connection with a lawsuit involving communication restrictions imposed by the State of Colorado through Colorado Revised Statute § 18-9-122(3), which restricts public communication between individuals within a physical interaction distance of eight feet.

9. The basis of my opinion is my review of over a dozen relevant communication studies, considerable input from colleagues who study interpersonal communication at other universities, my own scholarly study and education, and my own expertise and experience as a public speaker and interpersonal communicator. I have also read the Affidavits filed by the plaintiffs in support of their motion for summary judgment, and the text of the statute which is the subject of the lawsuit.

I offer the following evaluation for the court's consideration:

10. (a) There are many important variables that affect the quality of interpersonal communication between strangers. Two of the most important factors that should be considered when studying the effectiveness of interpersonal communication are immediacy and empathy. To explain immediacy, let me quote one of the most widely read communication textbooks by Joseph A. DeVito, "Immediacy refers to the joining of a speaker and listener, the creation of a sense of togetherness, of oneness. . . . Nonverbally we communicate immediacy by maintaining appropriate eye contact, a physical closeness that echoes a psychological

closeness, and a direct and open body posture" (1989, p. 106).[1] Immediacy can be simply understood as the perceived physical and psychological distance between two people.

10. (b) Perceptions of physical and psychological distance differ according to our cultural background. According to Carley Dodd, "high-immediacy behaviors in the U.S. include smiling, touching, eye contact, open body position, closer distance." Research shows that greater immediacy produces more effective and more satisfying interpersonal communication.

10. (c) Some of the most extensive research on immediacy behaviors has been conducted by Dr. Judee Burgoon of the University of Arizona (please see the citations provided in Appendix B). Dr. J. Burgoon, one of the most respected and widely read nonverbal communication scholars in the country, has shown that immediacy behaviors can significantly enhance interpersonal communication. Even when strangers interact, if the non-expected immediacy behaviors are violated in a positive way (for example, if you expect a person to be unfriendly and distant, and they approach you with respect and communicate a caring attitude and personal concern for you), the violation of expectancies can lead to positive outcomes (a satisfying conversation and increased understanding).

10. (d) With respect to the present question regarding the freedom of a person to establish high immediacy in a public place with another person they do not know, current research would predict that positive outcomes can often result from such interactions.

11. (a) A second important fact that affects interpersonal

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1. Specific text references are listed in Appendix B attached.

communication is empathy, which refers to the ability to closely associate with the feelings of another person. Empathy is also positively associated with effective communication. To explain empathy and its characteristics, let me again quote from Joseph DeVito's widely used textbook on interpersonal communication: "To empathize with someone is to feel as that person feels" (1989, p. 97).

11. (b) Like immediacy, empathy is communicated both verbally and nonverbally. DeVito states, "Nonverbally, we can communicate empathy by demonstrating (1) an active involvement with the other person through appropriate facial expressions and gestures, (2) a focused concentration including eye contact, attentive body posture, and physical closeness, and (3) appropriate touching." As empathy increases during interpersonal communication between strangers, the communication effectiveness increases and the satisfaction experienced through the interaction increases.

12. In summary, the ability for an individual to establish immediacy and empathy with another person is enhanced though close proximity within acceptable cultural and social norms in a given communication context, and is inhibited by increased distance. The ability for two strangers communicating interpersonally in a public space to create immediacy and empathy is significantly reduced at a distance of eight feet or greater as compared to four feet, which is an appropriate distance for interpersonal communication between strangers within the United States.

13. The intimate and personal nature of the interpersonal communication the plaintiffs seek to engage in with strangers cannot be effectively initiated at a distance of eight feet or greater. Eight feet may be a very appropriate distance for discussing business transactions; however, it is not an

appropriate distance for discussing one of the most emotionally difficult and life-changing decisions a person can make, such as abortion.

14. The communication context directly affects the appropriateness and necessity of communication proximity. In an enclosed room inside a building, a common environment for business transactions, clear communication can be engaged in at distances of eight feet. In an outdoor public place, interpersonal communication at distances of eight feet and greater is more difficult due to background noise and the presence of other persons in the public space. In other words, when two people are talking to each other in an outdoor pubic area, they normally are closer to each other than when in an indoor setting.

15. The intercultural communication context present in the Colorado area is an important factor when considering the appropriateness of proxemic communication behavior. Research by E. T. Hall (1966, 1983), one of the most widely cited scholars on cultural differences in nonverbal communication behaviors, as well as a number of other communication researchers, has demonstrated that Hispanic Americans communicate at closer distances than do Anglo Americans. Because of the high Hispanic American population in the southwestern United States, setting any kind of arbitrary standard regarding the distance at which a stranger invades a person's sense of personal space to the point that it is considered as harassment is nonsupportable.

16. Research shows that when people are experiencing stress they more accurately decode kinesic (movement) expressions than they do vocal expressions. Thus it is difficult to effectively communicate with a person experiencing stress if one is forced to speak loudly and maintain a distance of eight

feet or greater. The increase in volume is more likely to increase stress and agitation, not reduce it.

17. Finally, the common sense of anyone who has ever engaged in an interpersonal conversation about an intimate topic supports the above opinions. Much of our communication research simply verifies what our own experience tells us, that communicating with another person about an intimate topic in closer proximity (four feet or less in our culture), with a softer voice, with direct eye contact, and with the use of appropriate gestures, is much more effective than communicating at a distance of eight feet or greater in a public place in which we would have to speak more loudly, and our nonverbal communication such as facial expressions, eye contact, and immediacy gestures would be less effective.

REPORT OF EXPERT OPINION OF PLAINTIFFS' EXPERT WITNESS, WILLIAM J. BROWN, M.A., Ph.D.

I, William J. Brown, M.A., Ph.D., submit the following report with attachments for the consideration of the Court in the matter entitled *Leila Jeanne Hill, and others, v. David Thomas, and others*, No. 93 CV 1984, Div. 2 (Jefferson County District Court). Attached hereto in Addendum 1 is a current copy of my academic vita. Attached hereto in Addendum 2 is a list of the materials in the field consulted or relied upon in the preparation of this report and my opinion.

Many variables affect interpersonal communication between strangers. Two important factors are immediacy and empathy. Immediacy can be simply understood as the perceived physical and psychological distance between two people. Empathy refers to the ability to closely associate with the feelings of

another person.

Immediacy.

Perceptions of physical and psychological distance differ according to our cultural background. Research shows that greater immediacy produces more effective and more satisfying interpersonal communication. Immediacy behaviors can significantly enhance interpersonal communication. With respect to the present question regarding the freedom of a person to establish high immediacy in a public place with another person they do not know, current research would predict that positive outcomes can often result from such interactions.

Empathy.

Empathy is also positively associated with effective communication. Like immediacy, empathy is communicated both verbally and nonverbally. Empathy is communicated by demonstrating active interest in with others through facial expressions and gestures, focused concentration (eye contact, body posture, physical closeness, and appropriate contact). As empathy increases during interpersonal communication between strangers, the communication effectiveness increases and the satisfaction experienced through the interaction increases.

The Impact On Immediacy and Empathy of Proximity Restrictions.

The ability for an individual to establish immediacy and empathy with another person is enhanced though close proximity within acceptable cultural and social norms in a given communication context, and is inhibited by increased distance. The ability for two strangers communicating interpersonally in a public space to create immediacy and empathy is significantly reduced at a distance of eight feet or

greater as compared to four feet, which is an appropriate distance for interpersonal communication between strangers within the United States. Intimate and personal communication with strangers cannot be effectively initiated at a distance of eight feet or greater. Eight feet may be a very appropriate distance for discussing business transactions. Eight feet is is not an appropriate distance for discussing emotionally difficult and life-changing decisions.

The communication context directly affects the appropriateness and necessity of communication proximity. In an enclosed room inside a building, a common environment for business transactions, clear communication can be engaged in at distances of eight feet. In an outdoor public place, interpersonal communication at distances of eight feet and greater is more difficult due to background noise and the presence of other persons in the public space. In other words, when two people are talking to each other in an outdoor pubic area, they normally are closer to each other than when in an indoor setting.

Intercultural Considerations For Communication

The intercultural communication context present in the Colorado area is an important factor when considering the appropriateness of proxemic communication behavior. Research has demonstrated that Hispanic Americans communicate at closer distances than do Anglo Americans. Because of the high Hispanic American population in the southwestern United States, setting any kind of arbitrary standard regarding the distance at which a stranger invades a person's sense of personal space to the point that it is considered as harassment is nonsupportable.

Stress Implications of Proximity Requirements

Research shows that when people are experiencing stress

they more accurately decode kinesic expressions than they do vocal expressions. Thus it is difficult to effectively communicate with a person experiencing stress if one is forced to speak loudly and maintain a distance of eight feet or greater. The increase in volume is more likely to increase stress and agitation, not reduce it.

Final Considerations

Finally, anyone who has ever engaged in an interpersonal conversation about an intimate topic recognizes the sensibility of the above opinions. Much communication research simply verifies what personal experience already has taught, that communicating with another person about an intimate topic in closer proximity (four feet or less in our culture), with a softer voice, with direct eye contact, and with the use of appropriate gestures, is much more effective than communicating at a distance of eight feet or greater in a public place in which we would have to speak more loudly, and our nonverbal communication such as facial expressions, eye contact, and immediacy gestures would be less effective.

EXPERT REPORT OF
WARREN M. HERN, M.D., M.P.H., Ph.D
March 30, 1994
Hill v. Thomas
Civil Action No. 93 CV 1984 - Div 2
State of Colorado, County of Jefferson

I. Professional Qualifications and Experience

See attached Curriculum Vitae.[1]

II. Summary of Opinions

1. I specialize in two areas of medicine: outpatient abortion practice and epidemiology.

2. I maintain a private practice in outpatient abortion at the Boulder Abortion Clinic, 1130 Alpine, Boulder, Colorado. I have been involved in providing abortion services to patients in Boulder, Colorado since 1973.

3. My patients and I have been targets of picketing and demonstrations since 1973, and my present clinic has been the target of picketing and demonstrations since it opened in 1975. The demonstrations became more aggressive in 1985.

4. My clinical staff and I have had the opportunity in the 20 years of my practice in Boulder, Colorado, to observe the impact of anti-abortion demonstrations on the psychological and physiological health of my patients. My staff and I have had the opportunity objectively to observe patients who enter my clinic both when anti-abortion protesters are present outside my clinic and when protesters are not present. Based upon

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1. The attached Curriculum Vitae, Exhibit A, was attested to as a true and correct copy in the affidavit of Dr. Hern executed by Dr. Hern on March 4, 1994, and subsequently filed in this action.

years of observation, it is my opinion that anti-abortion protests outside my clinic have a profound negative effect on the psychological and physiological health of my patients.

5. I have observed that patients experience considerably more stress when demonstrators are present, and that my patients' psychological and physiological symptoms of stress corresponded to the aggressiveness of the demonstrators. As explained in my paper, "Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations," attached as Exhibit B, social science research has shown that approaches by strangers closer than approximately three yards are stressful and are interpreted as a threat.

6. I have personally observed a number of physiological symptoms in patients after they were exposed to aggressive demonstrating. When protesters are present, patients often come in to my office shaking, tearful, and in great distress from harassment and insults, because the demonstrators approached them very closely. Clinic staff would have to calm them down for some time, which often delayed their medical care.

7. Patients experienced a "fight-or-flight" reaction, especially when demonstrators approached closely. Patients exhibited evidence of this reaction, such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention. These reactions increased the difficulty and risk of administering medical treatment to the patients.

8. Urinary retention made it difficult to perform a pelvic examination and accurately determine the size and condition of the patient's uterus, which is essential to safe completion of a surgical abortion.

9. Hyperventilation can lead to agitation and muscle spasms, making it more difficult for patients-to remain still during medical treatment, thus increasing the risks of

complications such as perforation of the uterus during the performance of an abortion.

10. In extreme cases, hyperventilation can lead to loss of consciousness, which is dangerous in and of itself, and which also increases the risk of complications during a surgical procedure such as an abortion.

11. Since 1987, section 5-3-10 of the Boulder Revised Municipal Code has required that demonstrators outside health care facilities must remain at least eight feet away from the person who is the target of their demonstrations, unless that person gives express oral consent for a closer approach.

12. Since passage of the Boulder ordinance, demonstrators have continued to appear outside my clinic. The demonstrators can still be easily seen and heard, and patients still experience some level of stress from their presence. However, because the ordinance prevents the demonstrators from approaching my patients too closely, the patients are able to obtain medical treatment without being subjected to the most aggressive and intrusive form of demonstrating.

13. Based upon the observations of myself and my staff, it is clear that because the patients are shielded by the Boulder ordinance from close physical confrontation, their stress levels are decreased and the medical risks posed by the presence of the demonstrators are also decreased.

14. Anti-abortion demonstrators consciously, openly and actively create an atmosphere of violence and confrontation through harsh rhetoric, shocking graphic displays and aggressive behavior.

15. This behavior and rhetoric gives psychological permission to aggressive persons to make verbal and physical assaults on women and clinic workers, especially physicians.

16. The psychophysiological reactions experienced by

women seeking services are reflections of real and appropriate fear of physical harm and result in serious additional risks for women about to have surgery.

17. The mere presence of anti-abortion demonstrators within earshot or visual distance is enough to provoke negative psychological and physiological reactions in patients, even when the protesters are across the street. However, based upon the observations of myself and my staff, when the demonstrators are close to the patients, as when they are blocking the sidewalk for patients, the severity of these reactions increases manyfold.

18. In my opinion, the actions of the demonstrators cannot be construed merely as an expression of free speech, because their very intrusive behavior physically and psychologically interferes with the patients' right to have a legal medical procedure performed on them in a proper clinical atmosphere which is as free from stress as possible. This is most graphically illustrated by violent actions which have taken one life and gravely injured numerous other individuals, especially physicians. In my opinion, there is no legitimate justification for permitting the active harassment of patients. Reasonable restrictions on the exercise of free speech and what some misconstrue as free speech are wholly appropriate to protect women who seek legal abortions. These actions constitute inappropriate, abusive, and unwelcome behavior that interferes with the constitutionally protected rights of others and may not be interpreted solely as "speech." Rather, these actions threaten the health of women as they seek medical attention.

III. Basis for Opinions Expressed

In November 1973, I was responsible for opening Colorado's first free-standing, non-profit abortion clinic, Boulder Valley Clinic, at 2346 Broadway in Boulder. I had been asked to help

organize and found this clinic by some interested Boulder citizens. I was appointed Medical Director, and I set up the clinic. I was the sole physician and performed all the abortions. At that time, vigorous opposition to the clinic's existence developed in Boulder. Many of the attacks were directed toward me, and I began receiving constant death threats. At the same time, patients arriving at the clinic were harassed by anti-abortion demonstrators. The women who came as patients were already tense and fearful as the era of illegal "back-alley" abortions had just passed, and some of the patients had experienced abortions previously under the most dangerous and sordid circumstances. These latter patients were the most apprehensive and displayed the most psychophysiologic symptoms.

Based on my objective observations of the physical and psychological condition of the Boulder Valley Clinic's patients, it was clear that the activities of the anti-abortion demonstrators measurably increased the stress experienced by the patients. This stress was demonstrated by increased anxiety when protesters were active. The patient anxiety was manifested by physiologic symptoms such as: (1) increased pulse rate; (2) hyperventilation (rapid breathing); and (3) greater vasomotor liability (fainting) in the operating room setting. The demonstrations clearly heightened the already serious stress experienced by the patients, who, based upon my discussions with them, were already having to make a painful and difficult life decision, sometimes without social or emotional support. The patients' already present fear of surgery, anxiety about the social stigma of abortion, and guilt carried from conservative religious traditions was greatly compounded by the actions of the protestors, and manifested itself in psychological and psychological symptoms.

At the end of 1974, I left Boulder Valley Clinic. On January 22, 1975, I opened my own private medical practice specializing in abortion services. The harassment from antiabortion protestors continued at the new practice. There were no demonstrations affecting the patients for a period of time because the entrance to my office was at the rear of the medical office building in which it was located.

In 1978, I took over the top floor of my building when the previous owners moved to a new building across the driveway. As a result of this change in my office space, my patients entered my office through the front door facing Alpine Street in Boulder, Colorado. The demonstrations outside the clinic then markedly increased, becoming a weekly, and then daily, occurrence.

The patients routinely expressed anger, fear, and other kinds of distress that they experienced as the result of having to walk through a phalanx of demonstrators. As with the patients at the Boulder Valley Clinic, my private practice patients often exhibited physiologic signs of stress such as. (1) increased pulse rate; (2) increased blood pressure; (3) hyperventilation; (4) crying; (5) vasomotor lability (fainting); and (6) diaphoresis (sweating). According to their individual accounts, which they communicated to myself and my staff, the stress that they experienced was due much more to the presence of demonstrators than to the experience of seeking an abortion.

In 1985, a significant increase in the level of harassment occurred when the Colorado Right To Life Committee declared a state-wide objective of closing my clinic, a plan they called "Operation Jericho." The declaration of this objective was accompanied by the sudden appearance, on several occasions, by hundreds of anti-abortion demonstrators in the street in front of my clinic. As the demonstrations increased in

intensity, my patients showed objective signs of greater stress manifested by the symptoms described above.

In the fall of 1985, my clinic was set upon by Joseph Scheidler, a former priest from Chicago. Scheidler operates the "Chicago Pro-Life Action Network" and is the author of a book titled Closed: 99 Ways to Close an Abortion Clinic. Scheidler describes (and practices) such tactics as using a bullhorn to scream obscene epithets at entering patients. Scheidler's arrival in Boulder on October 21, 1985, was given wide publicity. Three days before to arrived, a stone came crashing through the front window of the waiting room in my clinic. Fortunately, no patients were there at the time, but the building was occupied. During the following week, Scheidler conducted daily demonstrations with as many as 50 to 100 demonstrators, effectively blocking the public sidewalks around my office. It was extremely difficult and frightening for the patients to enter my office, not just to have abortions, but also to obtain follow-up examinations and prescriptions for birth control, routine medical care of other kinds, emergency treatment for complications, and routine annual physical examinations.

During the period from 1985 or 1986 through 1990, anti-abortion demonstrators frequently surrounded my clinic on all sides, assembling at 6:00 A.M. to sing and shout at me as I attempted to rest in my on-call quarters at the rear of the building. In March of 1988, five shots were fired through the front windows of my office by someone using a high-powered rifle. I then installed four layers of bullet-proof glass and Lexan in the front of the building and in strategic side windows. This protection has now been extended.

From 1985 or 1986 through 1988, anti-abortion demonstrators often came into the back parking lot of my clinic in order to harass patients and approach them personally This

was accompanied by ostentatiously obvious efforts to photograph patients and their families as they entered and left my office.

On one occasion, an extremely young adolescent girl who was accompanied by her mother, came through an especially hostile and abusive group of demonstrators on my front sidewalk. She was so emotionally traumatized that she sank into what is best described as a clinically catatonic state in the clinic's front waiting room. She withdrew into the corner and would not respond to any verbal stimuli. It took a great deal of effort on the part of both my staff and the patient's mother to enable her to participate in her own medical care. The severity of this patient's reaction was uncommon, but many patients have manifested similar, if less severe, symptoms of withdrawal.

On many occasions, I have personally comforted women who entered my office crying, shaking, distraught and physiologically disturbed, in the ways described in this report, as the result of the anti-abortion demonstrations. According to my own and my staff's personal conversations with these women, they had faced a difficult decision, but were calm and resolved until they faced the obloquy of the anti-abortion fanatics on the front sidewalk of my clinic.

On several occasions, we have started the working day with my clinic surrounded by over 100 armed peace officers from all forces in Boulder County to protect us from the anti-abortion group Operation Rescue. In my considered opinion, many anti-abortion demonstrators are not peaceful, and reasonable restrictions on their behavior, such as the ordinance in Boulder, has greatly improved the psychological and physiological health, of my patients

IV. Chronology of Observations

Since 1973, I have observed abortion patients under a wide variety of changing circumstances, some already described, that fall into the following general pattern:

1. Immediately following the opening of Boulder Valley Clinic, anti-abortion demonstrators were present and harassed patients entering the front door. The demonstrators were peaceful and generally quiet, but their presence caused moderate to severe stress for some patients. Following the arrangement of patient parking in the rear of the building and advice to patients to enter the clinic grounds through the rear parking lot, thus avoiding the picketers, it was apparent that patients experienced less stress as the result of avoiding this confrontation. They used the same front entrance but did not have to go through the demonstrators. Eventually, the demonstrations became more sporadic. While some patients showed evidence of anxiety, especially those who had negative previous experiences with illegal abortion, the vast majority of patients were calm, focused on their decision, and able to concentrate on the sufficiently difficult experience of the abortion procedure. These patients displayed few to none of the symptoms displayed by those who had to pass through the demonstrators.

2. When I first started my own practice in 1975, my patients did not encounter demonstrators, and this did not occur to any significant degree until 1978. When the demonstrations began, I immediately observed serious psychophysiologic symptoms in patients who were being verbally abused by anti-abortion demonstrators and as the result of the mere presence of the demonstrators. We found that most of the individual counseling time which we had routinely scheduled for each patient was occupied with helping the patients cope with the stress of encountering anti-abortion demonstrators. My

experienced staff and I observed many extreme reactions in patients as the result of anti-abortion demonstrators over the years, and we became convinced that the demonstrations added very considerable stress and risk to the abortion experience for these women.

3. Following the successful defense of a court challenge to the Boulder Buffer Zone Ordinance in 1987, we found that law-enforcement authorities were able to discourage the most aggressive anti-abortion harassment of patients in front of my clinic, and this helped the patients a great deal. We saw a decrease in the severity and frequency of the most significant psychophysiologic symptoms that had been experienced by patients subjected to severe harassment. This was not solely the effect of the minimum 8-foot limit but also the strong message from the community that there was a limit which anti-abortion demonstrators could not cross. As the result of this strong community message, most demonstrations ceased or were often kept to more reasonable distances.

4. Several years after passage of the Boulder Buffer Zone ordinance, in 1989 and 1990, Operation Rescue came to my clinic on at least two occasions. On one of these occasions, Operation Rescues's national leader, Randall Terry, prayed for my death in the street in front of my clinic in October, 1990. This large demonstration was very frightening to patients. We had to pick up some patients at distant points and bring them to my office in an unmarked van under police protection. These patients displayed many symptoms of stress of the kind described previously.

5. During the past two years or so, we have had few anti-abortion demonstrations at my office, and we note a marked and dramatic reduction in the number and severity of psychophysiologic symptoms experienced by the patients

which are unrelated to the surgical procedure itself: symptoms that people have are specifically related to fear of surgery, fear of needles, fear of pain, and other appropriate anxieties. These reactions are far more manageable from a medical point of view because they do not involve fear of abuse and attack by strangers as punishment for having made an extremely private and painful decision. Each patient is more likely to recognize the attention she is getting is about her safety and welfare and it comes to her from people who support her decision.

V. Summary

Anti-abortion demonstrators are free to assemble and speak as are others. But their mere presence at a clinic where women receive this extremely sensitive and private medical care is disruptive, inappropriate and dangerous to the health of the women seeking the care. In my opinion, the issues presented in this case concern the behavior of the anti-abortion demonstrators, not simply their exercise of free speech.

As stated in my 1991 paper entitled, "Proxemics: Application of Anthropological Theory in Anti-Abortion Demonstrations," Population and Environment; the demonstrators are clearly violating fundamental cultural conventions concerning the appropriate use of space. Patients approaching my clinic are anticipating doing so in a private manner as they would any medical office for any medical treatment. Demonstrators then subject the patients to unwelcome and inappropriate normative messages in close personal proximity designed to make the patients extremely uncomfortable. As shown by my patients' physiological and psychological reactions to the demonstrations, the demonstrators largely succeed in creating extreme physical and psychological reactions in my patients.

The violation of these very profound cultural conventions

governing the appropriate use of space has the effect of producing extreme anxiety and even panic in those experiencing it. In my opinion, the actions of the demonstrators amount to psychological rape. Violation of these deeply ingrained conventions, which are quite subtle and not consciously perceived by most people, are experienced as physical assault, and they produce the same psychophysiologic reactions as physical assault.

As a result of the actions of anti-abortion demonstrators, abortion patients suffer fear, stress, increased physiologic instability and discomfort, increased risk of certain kinds of preventable complications and searing guilt that they will carry all their lives.

In my opinion, the minimum distance at which antiabortion demonstrators should be kept is similar to the resolution produced by the constitutional conflict concerning political activity near polling places: it should be at least 100 feet. In my opinion, the safety and health of women who choose to exercise their constitutional right to seek abortion is comparable to the right to vote without coercion or duress.

AFFIDAVIT OF MARIANNE LAFRANCE, M.A., Ph.D.

Marianne LaFrance, M.A. Ph.D. states as follows:

1. I am presently Professor of Psychology at Boston College, a fully accredited graduate institution in the state of Massachusetts. My responsibilities include teaching and advising graduate and undergraduate courses in social psychology and nonverbal communication, acting as doctoral dissertation advisor in the Department of Psychology as well as in the School of Education and the School of Nursing, and conducting research.

2. I received a B.A. Hons. Degree in Psychology from the University of Windsor, Windsor, Ontario, Canada in 1969, an M.A. degree in Social Psychology from Boston University in 1971 and a Ph.D degree in Social Psychology from Boston University in 1974.

3. I was promoted to my present position as full Professor at Boston College in 1990 having been before that Assistant Professor from 1974-1980 and Associate Professor from 1980-1990. In addition, I have held appointments as Mellon Scholar at Radcliffe College, Harvard University in Cambridge, Massachusetts, as Visiting Scholar at the University of California at San Francisco, and as Visiting Research Professor at Yale University in New Haven, Connecticut.

4. Along with my activities as a Social Psychologist and Nonverbal Communication Researcher, I have served on a number of editorial boards that publish research in this area including the Journal of Nonverbal Behavior, the Journal of Communication, and Human Communication Research and have been a panel member on research review committees at the National Institute of Mental Health and the National Science Foundation. I have also consulted on matters of communication to several public institutions, have devised a number of training programs in nonverbal communication skills for large organizations and have lectured nationally and internationally in this domain.

5. Currently, I am actively involved in teaching, consulting, and scholarship having just received a three-year research grant from the National Science Foundation to study nonverbal cues associated with nonverbal messages of affiliation and dominance.

6. My specific area of expertise is the study of nonverbal communication which is the systematic examination of how

people respond to and influence each other via cues in their social environment such as interpersonal space, facial expression, gesture, vocal intonation and touch. I have co-authored a book on this topic, have been the principal investigator on a number of research grants in this area from the National Institute of Mental Health and the National Science Foundation, and have published extensively on nonverbal communication in peer reviewed journals.

7. I have been asked to provide an expert opinion in connection with the Colorado "Bubblezone" law, Colorado Revised Statute § 18-9-122 C.R.S., which specifies that no person shall knowingly approach another person within a physical interaction distance of eight feet without their consent at a health care facility for purposes of communication.

8. The basis of my opinion is my own published research in this area (cf. Polit and LaFrance,1977; LaFrance and Mayo,1978), my published and unpublished reviews of the literature presented by others in this area (cf. LaFrance & Mayo,1979), my teaching in this area for 20 years; my consultation with colleagues who conduct research on proxemics, and my expertise as a consultant and trainer in this domain. I have also read the affidavits filed by the Plaintiffs and the text of the statute which is the subject of this lawsuit.

I offer the following description and assessment of the facts on the approximately 40 year old field of *Proxemics* for the court's consideration.

9. (a) Personal space may be defined as the invisible, portable, adjustable bubble that individuals maintain around themselves, that is actively maintained particularly around strangers, to protect the person from physical and emotional threats. (Katz,1937; Sommer,1969).

9. (b) Personal space is indispensable to human functioning

in three ways: (i) Personal space functions as a mechanism to sustain *privacy*; (Goffman) (ii) Personal space acts as a buffer against physical or psychological threat; (Sommer and (iii) Personal space is a way for people to deal adaptively with *overload* (Milgram,).

9. (c) Personal space between people increases as the relationship between them becomes less familiar. For example, the anthropologist Edward T. Hall has arrived at the following classification of normative interpersonal distances for people in the United States: *intimate relationships* involving family and loved ones (18 inches and less); *personal relationships* involving friends and co-workers (one and a half to four feet); *social-consultative* relationships involving transactions among strangers or impersonal business (four to twelve feet); and *public relationships* twelve feet and over).

10. (a) With respect to the question as to what happens when a person's personal space is invaded, research consistently shows that inappropriate close distances are noxious and stressful.

10. (b) Personal space invasion is said to occur when an encroacher violates the norms of interpersonal distance by approaching too closely where the subject does not expect or desire to interact with the potential invader (Sommer, 1966).

10. (c) Personal space invasion has been shown to be stressful as measured in a variety of ways.

10. (d) Personal space invasion has been shown to result in significant increases in *physiological arousal* (e.g., Aiello et al 1977; Janik et al, 1983: Middlemist et al 1976).

10. (e) Personal space invasion reliably produces reactions of *avoidance and withdrawal* (Baum et al,1975; Davis & Lennon 1983; Polit and LaFrance, 1977).

10. (f) Personal space invasion results in people showing

active signs of *subjective discomfort* such as defensive movements and speech disruptions (Rozelle & Baxter,1978) or hostility (Milgram,1970).

10. (g) Personal space invasion *decreases cognitive performance*, that is people think less well when someone has violated norms for appropriate interpersonal space (Worchel et al 1976; 1979).

11. (a) With respect to whether requiring people to maintain a distance of eight feet, from users of health care facilities *interferes* with or restricts the ability to communicate with those people, research actually shows that communication may be *enhanced* at moderate (6-10 feet) rather than at close distances (1-4 feet).

11. (b) People are more willing to talk about personal issues when they were seated at moderate distances (5 feet) than when there were seated either at close distances (2 feet) or far distances (10 feet). (Stone & Morden,1976). Health care issues are clearly personal issues.

11. (c) When people are exposed to someone delivering a persuasive message at one of three interpersonal distances (two feet, six feet, fifteen feet), the optimal distance for changing someone's attitude was fifteen feet. At closer distances, the participants seemed distracted by the presence of the persuader because they felt unduly pressured (Albert & Dabbs, 1970).

11. (d) People are more likely to comply with an influence attempt by a member of another group if the request is made at farther rather than close distances (Coutts & Ledden,1977; Glick et al,1988).

12. (a) With regard to whether personal space varies between individuals and groups, the findings show a number of contextual effects. Although various factors have been shown to effect personal space, the conclusion that "setting any kind

of arbitrary standard regarding the distance at which a stranger invades a person's sense of personal space to the point that is considered as harassment is non supportable" (Brown affidavit # 15) is itself non supportable. That conclusion is based on the following.

12. (b) In all cultural groups studied, strangers maintain farther interpersonal distances than do friends or acquaintances (Mehrabian,1969).

12. (c) Across several different groups, people chose greater distances when interacting with persons perceived to be unfriendly (Kleck,1969) or to be showing emotional behavior (Mrinal et al 1989). Moreover research shows that one of the most significant factors for generating anger in other people are situations in which self-opinionated people are present, e.g., those who know best, those who do not take other's views seriously (Torestad,1990).

12. (d) While there is some indication that Hispanics interact at closer distances than do Anglos or Blacks these cultural distances tend to be maintained only if *all* parties to an interaction share the same cultural background (Knapp & Hall,1992).

13. (a) There is research support for Statute 18-9-122's stipulation that "no person shall knowingly approach another person within eight feet of such person, unless such other person consents". Specifically, findings show that maintaining a distance from strangers affords some degree of defense (Dosey & Miesels,1969) and that being in control of interpersonal distances and perceiving that one has that control, may be necessary for principles of personal space regulation to be manifested in a given situation (Edney, Walker, & Jordan,1976). Having the freedom to move away or requiring the other person to move away may be crucial for that control

(Barnard & Bell,1982).

14. (a) In situations considered to be potentially threatening, people react by requiring greater personal space (Albas & Albas,1989).

14. (b) Research indicates that implied physical threat and implicit threat in the form of conflicting viewpoints are among the most likely social releasers of the need for greater personal space (Bailey, Hartnett and Gibson, 1972).

14. (c) Research shows that people tend to adopt greater than usual personal space from pregnant women (Davis & Lennon,1983)

15. Finally, the experience of anyone who has ever experienced public life supports the above opinions. There is a social rule that governs most situations involving strangers congregating in public places. The rule is that given a choice, one should take the position farthest away from the others who are present. When people elect to behave differently, that is to move close to a stranger when there is space available, the norm is violated. Moreover, when people use health care facilities, they are most likely to experience greater need for personal space due to the combined needs for privacy, safety, and overload.

RESPONSE OF GALE A. NORTON,
ATTORNEY GENERAL OF COLORADO,
TO PLAINTIFF'S FIRST SET
OF DISCOVERY REQUESTS

Defendant Gale A. Norton responds to Plaintiff's requests for discovery as follows:

RESPONSES TO REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1. Admit that publicly

owned side-walks within 100 feet of the entrance to a health care facility are traditional public forums under the Public Forum Doctrine announced by the United States Supreme Court.

RESPONSE NO. 1. Admitted, as to all such sidewalks of which Defendant is aware.

REQUEST FOR ADMISSION NO. 2. Admit that the display of signs and posters is a well-recognized form of expression protected by the Constitutions of the United States and of Colorado.

RESPONSE NO. 2. Admitted in part. Display of signs and posters is constitutionally protected, but is not exempt from reasonable time, place and manner regulations. See Heffron v. ISKCON, 452 U.S. 640, 647 (1981).

REQUEST FOR ADMISSION NO. 3. Admit that the distribution of free written materials, including pamphlets and handbills, is a well-recognized form of expression protection by the Constitutions of the United States and of Colorado.

RESPONSE NO. 3. Admitted in part. Distribution of free written materials is constitutionally protected, but is not exempt from reasonable time, place and manner regulations. See Heffron v. ISKCON, 452 U.S. 640, 647 (1981).

REQUEST FOR ADMISSION NO. 4. Admit that oral expression, including spoken messages with educational, protest, or counselling content, are well-recognized forms of expression protected by the Constitution of the United States and of Colorado.

RESPONSE NO. 4. Admitted in part. Oral expression is constitutionally protected, but is not exempt from reasonable time, place and manner regulations. See Heffron v. ISKCON, 452 U.S. 640, 647 (1981).

REQUEST FOR ADMISSION NO. 5. Admit that Section 18-

9-122(3), Colorado Revised Statutes, which makes it a class three misdemeanor for a person to display a sign to another person without the consent of such person before the display occurs, if such conduct is committed while within 100 feet of the entrance to a health care facility and while closer than 8 feet to another person, is applicable to the display of a sign containing the text of the First Amendment to the United States Constitution to another person.

RESPONSE NO. 5. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within eight feet of such person ... for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person." Not all the elements of the offense appear to be present in the given fact situation. However, the content of any sign displayed is irrelevant to the application of the statute.

REQUEST FOR ADMISSION NO. 6. Admit that Section 18-9-122(3), Colorado Revised Statutes, which makes it a class three misdemeanor for a person to pass a pamphlet or handbill to another person with the consent of such person before the pass occurs, if such conduct is committed while within 100 feet of the entrance to a health care facility and while closer than 8 feet to another person, is applicable to the passing of a copy of the pamphlet containing excerpts from "The Confessions," by Augustine of Hippo.

RESPONSE NO. 6. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within

eight feet of such person ... for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other flaying person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person." Not all the elements of the offense appear to be present in the given fact situation. However, the content of any pamphlet passed is irrelevant to the application of the statute.

REQUEST FOR ADMISSION NO. 7. Admit that Section 18-9-122(3), Colorado Revised Statutes, makes it a class three misdemeanor for a person to orally communicate opposition to, or support for, an issue of concern to the speaker to another person without the consent of such person before the communication occurs, if such conduct is committed while within 100 feet of the entrance to a health care facility and while closer than 8 feet to another person.

RESPONSE NO. 7. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within eight feet of such person ... for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person." Not all the elements of the offense appear to be present in the given fact situation. However, the content of oral communication is irrelevant to the application of the statute.

REQUEST FOR ADMISSION NO. 8. Admit that Section 18-9-122(3), Colorado Revised Statutes, makes it a class 3 misdemeanor for a person to orally state, "Abortion is bad for our country and it is bad for you," to another person without the consent of such person if such conduct is committed while within 100 feet of the entrance to a health care facility and while closer than 8 feet to such other person.

RESPONSE NO. 8. Denied. Section 18-9-122(3) prohibits only those who"knowingly approach another person within eight feet of such person ... for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person." Not all the elements of the offense appear to be present in the given fact situation. However, the content of oral communication is irrelevant to the application of the statute.

REQUEST FOR ADMISSION NO. 9. Admit that Section 18-9-22(3), Colorado Revised Statutes, makes it a class three misdemeanor for a person to orally state, "I oppose the bond referendum to construct an addition onto our community hospital," to another person without the consent of such person if such conduct is committed while within 100 feet of the entrance to a health care facility and while closer than 8 feet to such other person.

RESPONSE NO. 9. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within eight feet of such person. . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest,

education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person." Not all the elements of the offense appear to be present in the given fact situation. However, the content of oral communication is irrelevant to the application of the statute.

REQUEST FOR ADMISSION NO. 10. Admit that Section 18-9-122(3), Colorado Revised Statutes, makes it a class three misdemeanor for a person to orally communicate educational information to another person without the consent of such person before the communication occurs, if such conduct is committed while within 100 feet of the entrance to a health care facility and while closer than 8 feet to another person.

RESPONSE NO. 10. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within eight feet of such person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person." Not all the elements of the offense appear to be present in the given fact situation. However, the content of oral communication is irrelevant to the application of the statute.

REQUEST FOR ADMISSION NO. 11. Admit that Section 18-9-122(3), Colorado Revised Statutes, makes it a class three misdemeanor for a person to orally state, "Abraham Lincoln,

the sixteenth president of the United states, fired General McClellan because he considered his execution of the Union battle plan to be listless and without direction," to another person without the consent of such person before the communication occurs if such conduct is committed while within 100 feet of the entrance to a health care facility and while closer than 8 feet to another person.

RESPONSE NO. 11. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within eight feet of such person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other Person." Not all the elements of the offense appear to be present in the given fact situation. However, the content of oral communication is irrelevant to the application of the statute.

REQUEST FOR ADMISSION NO. 12. Admit that Section 18-9-122(3), Colorado Revised Statutes, subordinates rights to freedom of speech, freedom of the press and freedom of assembly to purely private decisions of persons who pass within eight feet of speakers while those speakers are within 100 feet of the entrance to medical facilities.

RESPONSE NO. 12. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within eight feet of such person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet

from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person" and "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Heffron v. ISKCON, 452 U.S. 640, 647 (1981).

REQUEST FOR ADMISSION NO. 13. Admit that loud speech such as shouting tends to be disturbing to others.

RESPONSE NO. 13. Denied. The impact of shouting depends on the context of the communication.

REQUEST FOR ADMISSION NO. 14. Admit that the State of Colorado has a compelling interest in securing the right to freedom of speech and of assembly for its citizens.

RESPONSE NO. 14. Defendant objects to this request as calling for a legal conclusion. Without waiving such objection, Art. II, sec. 10 of the Colorado Constitution provides that, "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish what he will on any subject, being responsible for all abuse of that liberty...." Art. II, sec. 24 of the Colorado Constitution provides that, "The people have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances, by petition or remonstrance."

REQUEST FOR ADMISSION NO. 15. Admit the fact that an individual who observes a sign from more than eight feet distance can disrupt its display under the terms of section 18-9-122(3), Colorado Revised Statutes, simply by denying consent for such display and remaining within eight feet of the person seeking to display the sign.

RESPONSE NO. 15. Denied. Section 18-9-122(3) prohibits

only those who "knowingly approach another person within eight feet of such person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person." Not all the elements of the offense appear to be present in the given fact situation.

REQUEST FOR ADMISSION NO. 16. Admit the fact that an individual who audits an oral expression of educational information from more than eight feet distance can disrupt its continued expression under the terms of section 18-9-122(3), Colorado Revised Statutes, simply by denying consent for expression of oral expression of educational information and then remaining within eight feet of the person seeking to orally express educational information.

RESPONSE NO. 16. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within eight feet of such person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person." Not all the elements of the offense appear to be present in the given fact situation.

REQUEST FOR ADMISSION NO. 17. Admit that a person walking on a public sidewalk or street can refuse to accept from another person pamphlets or handbills being distributed by such

other person on public sidewalks or streets.

RESPONSE NO. 17. Denied. A person's general ability to refuse handbills may be overcome by the number of people distributing handbills, their location, and the forcefulness of their tactics.

REQUEST FOR ADMISSION NO. 18. Admit that a person walking on a public sidewalk or street can ignore and pass by persons engaging in oral protest on a public sidewalk if the content such communication is not of interest to him.

RESPONSE NO. 18. Denied. The ability to ignore or pass by persons offering oral education varies, depending on the number and location of such persons, their aggressiveness and persistence, and the volume of their speech.

REQUEST FOR ADMISSION NO. 19. Admit that Section 18-9-122(3) authorizes criminal prosecution of any person, or entity, who fails to discontinue or restrict leafletting, picketing, or oral protest, education or counseling, when consent for such activity has been denied by a person who is closer than eight feet distance while the speaker is within 100 feet of the entrance to a medical facility.

RESPONSE NO. 19. Denied. Section 18-9-122(3) prohibits only those who "knowingly approach another person within eight feet of such person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door" to any "entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in the state of Colorado, without the consent of "such other person...." Not all the elements of the offense appear to be present in the given fact situation.

REQUEST FOR ADMISSION NO. 20. Admit that Section

18-9-122(3) authorizes government officials or government entities to prosecute persons who refuse to cease communications prohibited under Section 18-9-122(3).

RESPONSE NO. 20. Admitted.

REQUEST FOR ADMISSION NO. 21. Admit that a violation of Section 18-9-122(3), committed in the presence of a law enforcement officer, could justify the arrest and detention of the person who violated the provisions of Section 18-9-122(3).

RESPONSE NO. 21. Admitted in part. A citation rather than detention may occur. See § 16-3-105, C.R.S.

REQUEST FOR ADMISSION NO. 22. Admit that, incident to an arrest for violation of Section 18-9-122(3), a detained person could be subjected to a search of the person, and evidence of criminality could be seized.

RESPONSE NO. 22. Defendant objects to this request as vague. Defendant is unable to ascertain whether "incident to an arrest" means before, during, or after the arrest; whether the arrest is custodial; and what is included within "evidence of criminality."

REQUEST FOR ADMISSION NO. 23. Admit the evidence of a violation of Section 18-9-122(3) could include signs, pamphlets and/or literature used in the commission of the offense.

RESPONSE NO. 23. Admitted.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1. If you have denied any of the requests for admissions above, and if you have not already done so in making that denial, please identify all facts relied upon by you in making the denial and identify all persons known to you who have knowledge of those facts.

ANSWER NO. 1. See individual responses to requests for admissions. Persons having knowledge of the facts and law

relied upon: Carol D. Angel, Senior Assistant Attorney General; Patricia S. Bangert, Deputy Attorney General: Timothy M. Tymkovich, Solicitor General: and Gale A. Norton, Attorney General.

INTERROGATORY NO. 2. Please identify each and every individual or individuals answering each of the interrogatories, requests for admission and requests for production. Identify the interrogatory, request for admission or request for production to which each individual or individuals provided information utilized in the response.

ANSWER NO. 2. Carol D. Angel, Senior Assistant Attorney General (all requests): Patricia S. Bangert, Deputy Attorney General (all requests except for document production requests); Timothy M. Tymkovich, Solicitor General fall requests except for document production requests); and Gale A. Norton, Attorney General (all requests except for document production requests).

INTERROGATORY NO. 3. Please identify each and every person consulted or assisting in answering these interrogatories or requests for admissions or in gathering the documents requested below.

ANSWER NO. 3. Same as response to Interrogatory No. 2.

INTERROGATORY NO. 4. Please identify all experts you intend to call at the trial of this matter. Your response should include, but should not be limited to: (l) a brief summary of the experts' qualifications; (2) a summary of the experts' anticipated testimony; (3) the substance of the facts and opinions on which the experts are expected to testify; and (4) a summary of the grounds for each opinion.

ANSWER NO. 4. Defendants intend to call Dr. Warren Hern and Dr. Marianne LaFrance as expert witnesses. Summaries of their qualifications were included or attached to their affidavits

in the Appendix to Defendants' Motion for Summary Judgment filed March 7, 1994. Their anticipated testimony, the substance of the facts and opinions to which they are expected to testify, and the grounds therefore, are all as summarized in the above-referenced affidavits.

INTERROGATORY NO. 5. Please identify all witnesses you intend to call at the trial of this matter. Your response should include, but not be limited to, a brief summary of the witness' anticipated testimony.

ANSWER NO. 5. Defendant intends to call the witnesses listed in the attachment to the March l, 1994 letter from Carol D. Angel to James Matthew Henderson, Sr. and Roger Westlund, with the exception of Linda Weber, who has been withdrawn due to unavailability. Their anticipated testimony is as set forth in the same document, and their affidavits, where applicable. A copy of the letter and its attachment are attached for reference.

INTERROGATORY NO. 6. Please identify all individuals who have knowledge of the facts and circumstances at issue in this matter.

ANSWER NO. 6. Defendant objects to this interrogatory as overly broad. Without waiving that objection, Defendant believes that individuals who have knowledge of the facts and circumstances at issue in this matter include: the members of the Colorado General Assembly; persons who testified before the General Assembly regarding the passage of § 18-9-122(3), C.R.S.; law enforcement personnel; staff and volunteers at health care facilities; individuals seeking access to health care facilities; the witnesses listed by Defendant; the Plaintiffs in this case; and demonstrators near health care facilities.

INTERROGATORY NO. 7. Please state whether you have experienced difficulty in ensuring access to medical facilities

within your jurisdiction as a consequence of literature distribution, sign displays, oral protest, oral counseling or oral education. If so, for each such incident, please state the date, time and location of the incident, the nature of the medical facility to which access was jeopardized, and whether the disruption of access was ever remedied.

ANSWER NO. 7. Defendant objects to this interrogatory because of the ambiguity of the term "your jurisdiction" directed towards the Attorney General, who does not have primary criminal enforcement authority within the State of Colorado. Without waiving such objection, Defendant responds that incidents of access problems through out the state of Colorado were set forth in the testimony before the Colorado General Assembly concerning the passage of § 18-9-122(3) (previously provided to Plaintiffs) and in the affidavits accompanying Defendants' Motion for Summary Judgment.

INTERROGATORY NO. 8. Please identify any verbal or written comments made to you or in your presence by any member of law enforcement concerning the limitations imposed by Section 18-9-122(3), C.R.S., Section 5-3-10 of the Boulder Revised Municipal Code, or Section 38-114 of the Denver Revised Municipal Code. For each identified comment, please state:

a. The name and job title of the person making such comment.

b. The date and time that the comment was made.

c. The place where the comment was made.

d. The names and addresses of any person hearing or seeing the comment.

e. The circumstances existing at the time the comment was made.

f. Your reaction to the comment at the time it was made, if

any.

ANSWER NO. 8. Defendant can recall no such comments.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1. Produce copies of all documents identified, relied upon or referred to in responding to the interrogatories and requests for admissions set forth above.

RESPONSE NO. 1. Copies of March 1, 1994 letter and text of § 18-9-122 are attached. Legislative history and affidavits have been previously provided to Plaintiffs.

REQUEST FOR PRODUCTION NO. 2. Produce copies of all documents which you intend to rely upon or introduce as exhibits at the trial of this matter.

RESPONSE NO. 2. Defendant has not yet identified which documents it intends to use as exhibits. Once such documents have been identified, Defendant will supplement this response. Copies of videotapes which Defendant may use as exhibits are being produced with this response.

REQUEST FOR PRODUCTION NO. 3. Produce copies of all documents furnished to or produced by the experts identified in Interrogatory No. 4.

RESPONSE NO. 3. Copies of March l, 1994 and March 16, 1994 letters to Henderson from Angel attached. Affidavits have been previously provided to Plaintiffs. Copies of articles provided by Dr. Hern will be available for review and copying at the Office of the Attorney General, 1525 Sherman 3rd Floor, Denver, CO 80203.

REQUEST FOR PRODUCTION NO. 4. Produce copies of all documents furnished to or produced by the witnesses identified in Interrogatory No. 5.

RESPONSE NO. 4. Copies of March 1 and March 16 letters to Henderson from Angel attached. Affidavits have been

previously provided to Plaintiffs.

REQUEST FOR PRODUCTION NO. 5. Produce copies of all documents in your possession, custody or control which refer to or relate to the fact and allegations set forth in the pleading in the above-captioned matter.

RESPONSE NO. 5. Copies attached.

REQUEST FOR PRODUCTION NO. 6. Produce copies of all documents in your possession, custody or control which were sent to or received from individuals who are not parties to this action, but which documents refer to or relate to defenses of the constitutionality of Section 18-9-122(3).

RESPONSE NO. 6. Copies attached. Documents protected by attorney-client or attorney work product privileges not produced.

REQUEST FOR PRODUCTION NO. 7. Produce copies of all correspondence between yourself and any other defendant which in any way relates to this matter.

RESPONSE NO. 7. Defendant has no documents within this category which are not protected by the attorney-client or attorney work product privileges.

NOTICE OF APPEAL

I. THE NATURE OF THE CASE

A. The Nature of the Controversy

Appellants Hill, Himmelmann and Simpson filed this action in the district court to challenge the constitutionality, under the state and federal constitutions, of a new, criminal, statutory provision enacted by the State of Colorado, and threatened to be enforced by the City of Lakewood and the District Attorney for the First Judicial District of Colorado. Appellants sought a declaratory judgment that C.R.S. § 18-9-122(3) was

unconstitutional on its face, and as threatened to be applied to the peaceful, nonviolent expression of the Appellants. Appellants also sought preliminary and permanent injunctive relief against enforcement of the challenged statute.

The challenged statute, C.R.S. § 18-9-122(3), provides:

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

Hill, Himmelmann and Simpson, who are advocates of the pro-life viewpoint and who seek to offer counsel and assistance to women seeking abortions, contend that C.R.S. § 18-9-122(3) is unconstitutional on its face for several reasons. In particular, C.R.S. § 18-9-122(3) unconstitutionally restricts speech because it is overbroad, a prior restraint, vague, and content- and viewpoint-based. In addition, C.R.S. § 18-9-122(3) is unconstitutionally discriminatory in violation of the right to equal protection of the law.

B. The Judgment And Order From Which This Appeal Is Taken

On April 22, 1994, the Honorable Gaspar F. Perricone issued an opinion and order granting the Defendants' Motion for Summary Judgment, denying Plaintiffs' Motion for Summary Judgment, and dismissing the Verified Complaint. This Court has jurisdiction to hear and determine this appeal pursuant to C.R.S. § 13-4-102 and C.A.R. 4(a).

C. The Judgment Resolved All Issues Pending Before The Trial Court

The April 22, 1994, Order resolved all pending issues between the parties.

D. This Judgment Was Not Made Final Under C.R.C.P. 54(b)

The Order, dated April 22, 1994, disposed of all issues among all the parties. Consequently, the judgment from which this appeal is taken is not one that was made final pursuant to a court order under C.R.C.P. 54(b).

E. The Date Of Judgment And Of Mailing

The judgment from which this appeal is being taken was rendered on April 22, 1994 and mailed to counsel on the same day.

F. There Were No Post-trial Extensions Of Time To File Motions

No parties have sought post-trial relief or extensions of time to file post-trial motions.

G. There Were No Post-trial Motions Filed

No parties have filed any post-trial motions.

H. There Are No Dates For Denial Of Post-trial Motions

Because no parties have filed post-trial motions, there are no dates on which such motions were denied or deemed denied.

I. There Were No Extensions To File The Notice Of Appeal

No parties sought extensions of time to file a notice of appeal.

II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

In the view of Hill, Himmelmann and Simpson, this appeal raises the following issues:

1. Whether the trial court erred by concluding that C.R.S. § 18-9-122(3) is not substantially overbroad?

2. Whether the trial court erred by concluding that C.R.S. § 18-9-122(3) is not a prior restraint?

3. Whether C.R.S. § 18-9-122(3) provides the procedural safeguards required of a system of prior restraint on the exercise of rights of freedom of speech and of the press?

4. Whether the trial court erred by concluding that C.R.S. § 18-9-122(3) does not allow unbridled discretion in its enforcement?

5. Whether the trial court erred by concluding that C.R.S. § 18-9-122(3) does not impose, or create the danger of, content-based prohibitions of speech?

6. Whether C.R.S. § 18-9-122(3) is unconstitutional because it omits any standard which would prevent the enforcement of content-based restrictions on speech?

7. Whether the trial court erred by concluding that C.R.S. § 18-9-122(3) does not impose, or create the danger of, viewpoint-based prohibitions of speech?

8. Whether C.R.S. § 18-9-122(3) is unconstitutional because it omits any standard which would prevent the enforcement of viewpoint-based restrictions on speech?

9. Whether the trial court erred by concluding that C.R.S. § 18-9-122(3) is not unconstitutionally vague?

10. Whether the trial court erred by concluding that C.R.S. § 18-9-122(3) is narrowly tailored?

11. Whether the state may subject the state and federal constitutional rights implicated in handbilling, sign displays, oral education, oral counseling and/or oral protest, in the traditional public forum, to the private vetoes of citizens?

12. Whether C.R.S. § 18-9-122(3) is unconstitutional because it denies equal protection of the laws to all citizens?

13. Whether the trial court erred by denying Plaintiffs' motion for leave to file a memorandum of law exceeding ten pages in length in support of the Motion for Preliminary Injunction?

III. STATEMENT REGARDING TRANSCRIPT

No evidentiary hearing was held in the trial court. The trial court granted Defendants' motion for summary judgment. Consequently, no transcript is necessary for the resolution of the issues raised on appeal.

IV. PREARGUMENT CONFERENCE STATEMENT

Hill, Himmelmann and Simpson do not request the scheduling of preargument conference.

V. IDENTIFICATION OF COUNSEL

All the plaintiffs were represented in the trial court by:

Roger W. Westlund # 11084
12000 N. Washington # 207
Thornton, CO 80241
(303) 450-0833

Jay Alan Sekulow +
James Matthew Henderson, Sr. +
*
Walter M. Weber +
Joel H. Thornton +
THE AMERICAN CENTER FOR LAW & JUSTICE
1000 Thomas Jefferson Street NW
Suite 520
Washington, DC 20007
(202) 337-2273

+ *Not admitted in this jurisdiction.*

* *Admitted for purposes of this action by order of Judge Perricone*

Defendant David J. Thomas was represented in this action by:
William A. Tuthill, #12487
Assistant County Attorney
100 Jefferson County Parkway # 5540

Golden, CO 80419-5540
(303) 271-8970

Defendant City of Lakewood, Colorado was represented in this action by:
Roger W. Noonan, #6085
Duane Woodard, #4397
Maureen Herr Juran, #20864
GORSUCH KIRGIS L.L.C.
1401 17th Street
Suite 1100
P.O. Box 17180
Denver, CO 80217-0180
(303) 299-8900

Defendants Gale Norton, the Attorney General of Colorado, and the State of Colorado were represented in this action by:
Patricia S. Bangert, #20541
Deputy Attorney General
Carol D. Angel, #13123
Senior Assistant Attorney General
Sherrie D. Vincent, #
Assistant Attorney General
Kathie A. Greenwalt Troudt, #
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
(303) 866-4500

VI. THE ORDER APPEALED

The decision and judgment from which this appeal is taken is attached hereto in the appendix.

[*Hill et al. v. Colorado et al.*, No. 98-1856]

The petition for a writ of certiorari is granted. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. Rule 29.2 does not apply.

Supreme Court, U.S.
FILED
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(4)

No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF FOR PETITIONERS

THOMAS P. MONAGHAN
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
JOEL H. THORNTON
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thomas Jefferson St., NW
Suite 609
Washington, DC 20007
(202) 337-2273

Attorneys for Petitioners

6088

QUESTIONS PRESENTED

Under a Colorado criminal law, no one may distribute leaflets, orally counsel, educate or protest, or display signs, within eight feet of another person, while within one hundred feet of the entrance to a medical facility, unless the speaker first seeks and gets consent from the other person. C.R.S. § 18-9-122(3). A speaker commits a crime if he communicates by any of these methods, without consent, while within eight feet of any person to whom the communication is addressed. The following questions are presented:

1. Does Colorado's statutory requirement that speakers obtain consent from passersby on public sidewalks and streets before speaking, displaying signs, or distributing leaflets unconstitutionally burden protected expressive rights in a traditional public forum?
2. Does Colorado's statutory designation of private citizens as censors of speech, picket signs, and leaflets on public streets and sidewalks impose an unconstitutional prior restraint?
3. Is a statute that gives broad discretion to passersby in public places to act as censors of speech, picket signs, and leaflets and which fails to prohibit content-based denials of the right to speak, to display signs, or to pass leaflets subject to strict scrutiny?
4. Is a statute that gives broad discretion to passersby in public places to act as censors of speech, picket signs, and leaflets and which fails to prohibit viewpoint-based denials of the right to speak, to display signs, or to pass leaflets unconstitutional per se?

PARTIES

All of the petitioners are listed in the caption on the cover. None of the petitioners is a corporation. *See* Supreme Court Rule 29.6.

In addition to the respondent listed in the caption on the cover, the following persons or entities were respondents in the proceedings below and are respondents in this Court:

David J. Thomas, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; the City of Lakewood, Colorado; and, Ken Salazar, in his official capacity as Attorney General of the State of Colorado.

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OPINIONS BELOW[1]

The trial court decision is unpublished. Pet. App. 30a. The first Colorado Court of Appeals decision is published as *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995) (Pet. App. 38a). This Court's prior order in *Hill v. Colorado*, No. 95-1905, is published as *Hill v. Colorado*, 519 U.S. 1145 (1997) (Pet. App. 47a, 48a). The second Colorado Court of Appeals decision is published as *Hill v. City of Lakewood*, 949 P.2d 107 (Colo. App. 1997) (Pet. App. 51a). The Colorado Supreme Court decision is published as *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999) (Pet. App. 1a).

JURISDICTION

The Colorado Supreme Court entered its decision on February 16, 1999. Petitioners filed their petition for writ of certiorari on May 17, 1999. This Court granted certiorari on September 28, 1999. This Court has jurisdiction over this matter under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the first and fourteenth amendments to the United States Constitution are set out in the Appendix to the Petition. Pet. App. 64a. C.R.S. § 18-9-122(3) provides:

> (3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

---

1. As used herein, "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari and "JA" refers to the Joint Appendix.

C.R.S. § 18-9-122(4) provides,

> For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

The entire text of C.R.S. § 18-9-122 is set out in the Appendix to the Petition. Pet. App. 64a-65a.

STATEMENT OF THE CASE

Statement of Facts

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., oppose legalized human abortion, because, in their opinions, human abortion exterminates innocent human life. JA 45, ¶ 4; JA 52, ¶ 3; JA 54-55, ¶ 3. Petitioners believe that many women who abort their children do so because no one has offered them information about alternatives to abortion. JA 48, ¶ 5; JA 52, ¶ 4; JA 55, ¶ 4.

Petitioners have engaged in an activity they call "sidewalk counseling" to offer other alternatives to abortion-bound women. JA 49, ¶ 6; JA 52, ¶ 5; JA 55, ¶ 5. Petitioners have educated, counseled, persuaded, or informed passersby about abortion and abortion alternatives through leafletting, sign displays, conversation, and other means. JA 49-50, ¶ 7; JA 53, ¶ 7; JA 55, ¶ 6.

Hill, Himmelmann and Simpson distributed leaflets about abortion and its alternatives, JA 49, ¶ 9; JA 53, ¶ 9 ; JA 56, ¶ 10, on public ways and sidewalks near abortion clinics. Petitioners also communicated by word of mouth. JA 51, ¶ 12; JA 53, ¶ 7; JA 55, ¶ 6. To teach others how to provide sidewalk counseling services, Hill prepared a manual entitled, "Sidewalk Counseling Workbook." JA 49-50, ¶ 8.

Petitioners prepared signs and posters, containing information about abortion and abortion alternatives for public display. JA

49, ¶ 7; JA 53, ¶ 10; JA 55, ¶ 6. Their posters contained text (e.g., "Abortion Kills Children") or pictures (e.g., photograph of baby killed by saline abortion). Simpson wore a "sandwich signboard" with both text and images. JA 56, ¶ 9. Hill has carried a model of an unborn child at ten weeks gestation, which she has displayed to the public as part of the counseling and education process. JA 49, ¶ 7.

Hill, Himmelmann and Simpson do not engage in violence to further their goals. The Colorado Supreme Court assumed, for the purpose of deciding the case below, "that petitioners have not engaged in, and do not intend to engage in, such dangerous and harassing conduct." Pet. App. 10a n.7.

Prior to the enactment of C.R.S. § 18-9-122(3), petitioners expressed their opposition to abortion, and engaged in public efforts to advise abortion-bound women that alternatives to abortion are available. They conducted sidewalk counseling on public ways and sidewalks within 100 feet of the entrances of health care facilities and spoke without fear that they could be silenced by those members of the public who might not care to hear, see, or receive their messages. Nor did they fear prosecution for failing to hide their messages from public view or audition. JA 50, ¶ 10; JA 53, ¶ 8; JA 56, ¶ 7. Petitioners distributed leaflets, displayed signs, and communicated orally with the public passing nearby while they were within 100 feet of the entrances of abortion clinics. JA 51, ¶ 12; JA 53, ¶ 9; JA 56, ¶ 7. Their activities occurred within eight feet of other persons. Based on their experience, petitioners have concluded that it is difficult to remain on the public ways or sidewalks, stay at least eight feet away from others, and speak, display signs, or communicate orally. JA 51, ¶ 13; JA 53-54, ¶ 11; JA 56, ¶ 11.

Hill had successes counseling women. She has seen

abortion-bound women change their minds after she spoke with them or gave them pamphlets. JA 51, ¶¶ 14-15. Hill has counseled women after abortions who grieved for the loss of children through abortion. *Id.*

In 1993, Colorado's legislature enacted legislation purporting to ensure unobstructed access to health care facilities. *See* Pet. App. 64a-65a. One provision of the legislation, C.R.S. § 18-9-122(2) directly prohibits conduct that interferes with access to facilities. The legislation also included another provision, C.R.S. § 18-9-122(3), at issue here, which restricts freedom of expression near health care facilities.

When C.R.S. § 18-9-122(3) became law, petitioners stopped or altered their public education and protest activities. Simpson discontinued his expressive activities for fear of prosecution. JA 57, ¶ 14. Hill and Himmelmann modified the means by which they sought to communicate with the public about abortion. JA 52, ¶ 16; JA 54, ¶ 13. These changes have made their expressive activities more difficult and less effective. Petitioners plan and desire to resume their expressive activities when they may do so free from the threat of prosecution resulting from possible dissatisfaction of some people with their message. JA 52, ¶ 17; JA 54, ¶ 14; JA 57, ¶ 15.

Course of Proceedings

The federal questions on which this Court granted review have been the focus of this litigation and the principal grounds of the decisions below. Petitioners sued in the District Court of Jefferson County, Colorado, asserting that C.R.S. § 18-9-122(3) violated several federal constitutional rights, including their rights to freedom of speech, press, peaceable assembly, due process of law, and equal protection of the laws. *See generally* JA 14-30 (Complaint).

1. *The trial court's treatment of the federal questions*

The trial court framed the issues this way: "It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment. The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed [sic] by the Constitution." Pet. App. 31a. The trial court held, "Plaintiff's [sic] conduct implicates First Amendment rights[,]" Pet. App. 31a-32a, and "[t]he public sidewalks and streets, including the ones that the statute would apply, [sic] constitute 'quintessential' public forum [sic] for First Amendment purposes." *Id.* (citation omitted).

Nevertheless, the trial court granted summary judgment for respondent. Pet. App. 36a. The trial court concluded that C.R.S. § 18-9-122(3) did not regulate speech according to its content or its viewpoint. The court held that, because the statute "applies not only to oral protest but to 'education' and 'counseling[,]'" the statute "applies to all viewpoints, rather then [sic] only certain viewpoints." Pet. App. 32a-33a. The trial court reasoned that the "statute in question applies even-handedly to all speakers and the content of their speech. All persons demonstrating are to comply with the statute." Pet. App. 33a.

The trial court found that C.R.S. § 18-9-122(3) was narrowly tailored because it "targets the offensive and disturbing conduct taking place outside health care facilities[,]" and "[i]t address[es] the exact source of evil it seeks to remedy," Pet. App. 33a, and because it leaves open ample alternative channels of communication. Pet. App. 33a.

The trial court also held that C.R.S. § 18-9-122(3) is not unconstitutionally overbroad because the statute was not so "sweeping in its scope as to deter both protected and unprotected speech." Pet. App. 34a. The trial court held that

"the statute does not prohibit speech." Pet. App. 35a. The trial court also concluded that the statute was not unconstitutionally vague and that it did not impose a prior restraint on expression. *Id.* at 35a-36a.

2. *The Colorado Court of Appeals' treatment of the federal questions on its initial review*

The Colorado Court of Appeals affirmed. Pet. App. 39a. The appeals court stated, "[t]he principal issue in this appeal is whether [the statute] violates the right to free speech contained in the First Amendment to the United States Constitution." *Id.*

The appeals court ruled that C.R.S. § 18-9-122(3) was content-neutral because it did "not address only the speech of anti-abortion protesters" and "would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant." Pet. App. 42a.

The appeals court held that the statute was "narrowly tailored" and "reasonably necessary to serve a significant government interest" in ensuring "safety and unobstructed access for patients and staff entering and departing from health care facilities." Pet. App. 43a. The appeals court reasoned that ample alternative channels of communication remained open because "posters and signs may be made visible at eight feet[,]" and because "plaintiffs may continue to communicate . . . at a distance of eight feet or more." *Id.*

The appeals court also concluded that the statute was not unconstitutionally vague, *id.* at 44a, and that it did not impose a system of prior restraints on expression, *id.* at 44a-45a. The appeals court did not explicitly address petitioners' arguments that C.R.S. § 18-9-122(3) created a viewpoint-based restriction on free speech through its restriction on "oral protest" and the requirement of consent and that the statute was unconstitutionally overbroad.

The Colorado Court of Appeals denied petitioners' request for rehearing. Pet. App. 60a. The Colorado Supreme Court denied review. Pet. App. 46a.

3. *This Court's treatment of the prior petition*

Petitioners sought review of the appeals court decision in this Court. After deciding *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), this Court granted the petition, vacated the judgment of the Colorado Court of Appeals, and remanded the case for further consideration in light of *Schenck*. *See* Pet. App. 47a-48.

4. *The Colorado Court of Appeals' treatment of the federal issues on remand from this Court*

On remand, the Colorado Court of Appeals again affirmed the judgment below. Pet. App. 52a. The appeals court decided that *Schenck* did not govern this case because it involved an injunction rather than a statute. Pet. App. 55a. Instead, the appeals court applied the standard announced in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "Applying the *Ward* rationale here, we conclude that the statute meets constitutional muster." Pet. App. 56a. Thus, the appeals court again held that section 18-9-122(3) did not violate petitioners' First Amendment rights. Pet. App. 57a.

5. *The Colorado Supreme Court's treatment of the federal questions*

Petitioners again sought review in the Colorado Supreme Court, which granted limited review, Pet. App. 58a-59a,[2] and affirmed the decision of the court of appeals, *id.* at 2a, 29a.

The Colorado Supreme Court identified the state interest supporting C.R.S. § 18-9-122 as the "interest in preserving the

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2. The Colorado Supreme Court denied review on every issue identified by petitioners and considered only the constitutionality of the statute in light of this Court's prior remand order. Pet. App. 59a.

health and safety of Colorado's citizens" and specifically the interest in "assuring a citizen's access to medical 'counseling and treatment' at Colorado health care facilities." Pet. App. 9a-10a. Invoking the "right to be let alone", the court concluded that petitioners' freedoms of speech, press, and assembly were subject to restriction in the name of fundamental rights of privacy. *Id.* at 13a-14a. "Here, the fundamental right balanced against the First Amendment rights of petitioners is the right that the General Assembly determined was 'imperative,' a citizen's right of access to 'counseling and treatment' at Colorado medical facilities." *Id.* at 14a (citations omitted). The Colorado Supreme Court concluded that "the First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental right, an individual's right to privacy . . . ." *Id.* at 15a.

In the court's view, *Schenck* was not dispositive because it "involved a judicially created preliminary injunction drawn solely for the parties before the Court" while "section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly . . . ." Pet. App. 19a. The Colorado Supreme Court decided that "the appropriate test to be applied in this case is found in *Ward v. Rock Against Racism*, 419 U.S. 781 (1989)." Pet. App. 16a.

The Colorado Supreme Court concluded that the statute was narrowly tailored, advanced a significant government interest, and left open ample alternative channels of communication. Pet. App. 24a-29a. "In sum," the court concluded, the statute "represents a fair legislative balancing of the 'right to protest or counsel against certain medical procedures' while protecting 'a person's right to obtain medical counseling and treatment.'"

Pet. App. 29a.

SUMMARY OF ARGUMENT

In a stunning strike against constitutional rights to freedom of expression, Colorado has enacted a statute with the sole effect of restricting the exercise of freedoms of speech, press, and assembly. Under C.R.S. § 18-9-122(3), an evangelist distributing gospel tracts, a pizzeria employee distributing discount coupons, or a nurse distributing flyers to explain a strike for improved working conditions, who are within 100 feet of any entrance door to any health care facility in Colorado, are prohibited from freely approaching closer than 8 feet to any other person if they want to offer their materials, or even just to speak, to passersby. Instead, pamphleteers and those who approach others to display signs or to speak, must obtain consent while at a distance greater than 8 feet from those with whom they would communicate. Communicating without consent is a criminal offense.

Colorado's statute flouts several doctrinal considerations relevant to laws affecting expression. The breadth and scope of Colorado's statutory suppression of speech are remarkable. This Court seldom has confronted a statute embodying such sweeping disregard for freedom of expression.

In practice, Colorado has given its citizens the power to impose a prior restraint on *unwelcome* speech. Under the statute, a prospective speaker must seek and obtain consent from a prospective listener, without approaching closer than eight feet. Decisions to grant or withhold consent will often – if not invariably – turn on the content and viewpoint of the proposed communication. Nonetheless, that decision will determine whether the speech is criminal or free.

The framework for resolving the present dispute is settled. *See Cornelius v. N.A.A.C.P. Legal Defense & Educ. Fund*, 473

U.S. 788 (1985). Initially, this Court must determine whether petitioners' activity is constitutionally protected. *Id.* at 797. Next, this Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Finally, this Court must decide whether the restrictions on expression survive the requisite constitutional scrutiny. *Id.*

First, the statute regulates petitioners' exercise of core constitutional rights of expression. Distributing leaflets, displaying signs, and orally educating, counseling, or protesting, are paradigms of protected forms of expression. This Court consistently has noted the constitutional value of these expressive activities. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 446 (1938); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

Second, the statute regulates protected expression in the traditional public forum. C.R.S. § 18-9-122(3) operates only in traditional public forum properties, where the constitutional rights of speech, press and assembly enjoy their greatest protection. *See, e.g., Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (plurality).

Third, the statute does not come close to satisfying the demanding tests for statutes that regulate core speech in the traditional public forum. It is unconstitutionally defective.

Because the statute targets *only* protected expression, not conduct, *Secretary of State v. J. H. Munson Co.*, 467 U.S. 847, 965-67 (1984), it is facially overbroad. Moreover, the statute is substantially overbroad; in every conceivable application of the statute, constitutionally protected expression is targeted.

The statute creates a prior restraint on speech and press, *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), by imposing requiring advance consent to leaflet, picket, or speak.

The statute omits all requisite safeguards for such a system of prior restraint and it grants unbridled discretion to licensors of speech; thus, it is an unconstitutional restraint.

The statute is an unconstitutional content-based restriction: it applies to *all* leafletting and to *all* sign displays, but it applies only to those *oral* communications which constitute protest, counsel or education; thus, it is a content-based restriction, *see, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68 (1997) and not narrowly drawn to any relevant, compelling governmental interest. By granting unlimited licensing power to private citizens, Colorado has created a condition under which the right to speak may be denied based on the content- or viewpoint of expression.

Even if the statute were analyzed as a time, place and manner restriction, it fails the requisite scrutiny. It is not reasonable. It is not narrowly tailored. And it fails to leave open ample alternative channels of communication.

Finally, the statute's commands are drawn in terms too vague to be tolerated under the Constitution, *see Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The statute operates at the core of the rights to freedom of speech, of the press, and of assembly. Consequently, it was the duty of the Colorado General Assembly to craft its restrictions with particular care to safeguard these "delicate and vulnerable, as well as supremely precious" freedoms, *NAACP v. Button*, 371 U.S. 415, 433 (1963).

ARGUMENT

COLORADO REVISED STATUTE § 18-9-122(3) IS UNCONSTITUTIONAL ON ITS FACE

This litigation challenges C.R.S. § 18-9-122(3) on its face.[3] The statute suffers from a myriad of fatal constitutional flaws.

Freedom of expression – an essential ingredient of liberty – must be jealously guarded, particularly when the controversial nature of the speaker's message has stirred emotions and triggered an attempt to suppress that message. *E.g.*, *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989). Popular speech and pleasant words have little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech is the protection afforded to unpopular, unpleasant, disturbing, or even despised speech. *Cf. Madsen v. Women's Health Center*, 512 U.S. 753, 773-74 (1994) (anti-abortion expression); *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (cross-burning); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (scurrilous attacks on public figure). Free speech

> may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom

3. "The seminal cases in which th[is] Court has held state legislation unconstitutional 'on its face'" resulted from this Court's determination that "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984) (citations and footnotes omitted); *see also FW/PBS v. City of Dallas*, 493 U.S. 215, 223 (1990).

> of speech, though not absolute . . . is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . . There is not room under our Constitution for a more restrictive view.

Terminiello v. Chicago, 337 U.S. 1, 3-4 (1949).[4]

The divisiveness of legalized human abortion – including debates over the contours of its legality, its morality, and its availability – provokes expressive activities that irritate, provoke, disturb, and test the patience of many.[5] But "if absolute assurance of tranquility is required, we may as well forget about free speech." *City of Houston*, 482 U.S. at 462 n.11 (editing marks and citation omitted). Here, the vices of C.R.S. § 18-9-122(3) compel the conclusion that it is unconstitutional. The judgment below must be reversed.

I. The Operation of C.R.S. § 18-9-122(3).

To understand the constitutional gravity of the wrong embodied in C.R.S. § 18-9-122(3), it is necessary to understand the statute's operation.

C.R.S. § 18-9-122(3) is a specific intent offense. No offense is committed if, within 100 feet of the entrance door to a health care facility, one person approaches another *without* the

4. *Cf.* M. Nimmer, *Freedom of Speech* § 1.04 (1984) (gathering cases and materials on the "safety valve" function of freedom of expression).

5. This Court has noted the divisive nature of abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality").

purpose of displaying a sign to, passing a leaflet to, or uttering oral protest, counsel or education to, the other. Pet. App. 65a. Thus, greater liberty of movement in public places is granted to persons who are *not* seeking to exercise constitutionally protected rights of freedom of speech, of press, and of assembly. The statute targets *speech*, not physical proximity. Worse still, unlike disabilities imposed by injunction, such as those at issue in *Schenck* and in *Madsen*, C.R.S. § 18-9-122(3) is not limited in application to those whose prior adjudicated misconduct warrants the imposition of otherwise impermissible disabilities on free expression. Instead, the statute restricts the constitutional rights of every person in that State without prohibiting approaches that might obstruct or approaches that occur for no reason whatever or without a purpose of communicating to others.

A. The Statute Operates " in the Public Way or Sidewalks"

C.R.S. § 18-9-122(3) restricts speech on

- all public ways or sidewalks, ways [6] within 100 feet
- of every entrance door
- to every health care facility
- everywhere in the State of Colorado.

B. The Statute Restricts Activity Undertaken "for the Purpose of Passing a Leaflet or Handbill to, Displaying a Sign to, or Engaging in Oral Protest, Education, or Counseling"

C.R.S. § 18-9-122(3) restricts

- anyone who displays a sign
- anyone who distributes a leaflet or handbill
- anyone who utters words constituting oral protests
- anyone who utters words constituting oral education and

6. These are traditional public forum properties. *See* Argument III, *infra*.

- anyone who utters words constituting oral counsel.

A would-be communicator is required to obtain consent from

- any person passing by on the sidewalk, street, or public way
- before knowingly approaching closer than eight feet for
- the purpose of communicating with that person in one of the ways restricted under the statute.

C. The Statute Forbids Communication "Unless Such Other Person Consents"

The statute requires consent from *every* person to whom communications will be directed, not just from patients of health care facilities, family members or companions of patients, staff members of health care facilities, or business partners of health care facilities. Instead, the speech-free bubble surrounds *every* person passing within 100 feet of an entrance door to any health care facility in the State, including

- passersby
- other sidewalk counselors
- demonstrators
- so-called "clinic escorts"
- patients and their companions
- facility employees and contractors
- and countless others.

D. The Statute Operates Within "a Radius of One Hundred Feet from any Entrance Door to a Health Care Facility"

The statute is not limited in its operation to the vicinity of abortion clinics. C.R.S. § 18-9-122(4) defines "health care facility" as "any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment" in Colorado. Pet. App. 65a. These zones exist outside every

- ambulatory surgical center
- hospital

- urgent care facility
- medical diagnostic facility
- general practitioner's office
- medical specialist's office (from allergists to endocrinologists to opthalmologists to vascular surgeons).

In addition to such locations obviously included within the definition of "health care facility," numerous other locations may be included because the statute includes any "entity" "licensed, certified, or otherwise authorized or permitted by law to administer medical treatment," leaving open, for example, the likely possibility that a school-based clinic or nurse's office or a industrial plant's nurse's station all fall within the scope of the statute, if the entrance doors to such locations are within 100 feet of a public sidewalk or way.

II. Petitioners' Leafletting, Sign Displays, and Oral Communications Are Constitutionally Protected.

C.R.S. § 18-9-122(3) targets only expression protected by the Constitution, including spoken words, sign displays, and leafletting. Petitioners have used all these means to disseminate information and viewpoints. JA 17-18, ¶¶ 17-20; JA 49, ¶ 7; JA 53, ¶ 7; JA 55, ¶ 6. Each of these methods of communication with the public is constitutionally protected.[7]

First, distributing leaflets on the public ways is a form of free speech protected under the Constitution. *McIntyre*, 514 U.S. at 347. There is no doubt that "leafletting [is an] expressive activit[y] involving 'speech' protected by the First

7. The State conceded this point. *See* Pet. App. 31a ("[i]t is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment"); *id.* at 31a-32a ("[t]here is no question that the Plaintiffs conduct implicates First Amendment rights"); JA at 217-18 ("[a]dmitted" that "[d]isplay of signs and posters," "[d]istribution of free written materials," and "[o]ral expression" are constitutionally protected).

Amendment." *United States v. Grace*, 461 U.S. 171, 176 (1983). *See also Schenck*, 519 U.S. at 377 (noting that leafletting is a "classic form[] of speech that lie[s] at the heart of the First Amendment"). Pamphleteering is a particularly inoffensive means of communication: "[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand," *United States v. Kokinda*, 497 U.S. 720, 734 (1990) (plurality). This Court's consistent jurisprudence has recognized free distribution of literature as expression protected by the Constitution. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lovell*, 303 U.S. at 452; *Heffron v. ISKCON*, 452 U.S. 640 (1981).

Second, displaying signs addressing public issues is a form of free speech resting "at the core of the first amendment," *Boos v. Barry*, 485 U.S. 312, 318 (1988); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) ("[p]ublic issue picketing . . . has always rested on the highest rung of the hierarchy of First Amendment values") (internal quotation marks and citations omitted). *Accord United States v. Grace*, 461 U.S. 171, 176-77 (1983) (and cases cited); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) ("classic expressive gesture of the solitary picket").

Third, oral communications rest at the very heart of the right to free speech. *City of Houston*; *Gregory*; *Edwards v. South Carolina*, 372 U.S. 339 (1963); *Schenck*, 519 U.S. at 377.

Without question, Petitioners' expressive activities enjoy constitutional protection.

III. The Colorado Public Sidewalks, Streets and Ways Affected by C.R.S. § 18-9-122(3) are Public Fora for Free Speech.

The public ways and sidewalks of Colorado, including those within 100 feet of the entrances to health care facilities, constitute "quintessential" public fora for free speech. *See Perry Educ. Ass'n v. Perry Local Educator's Ass'n,* 460 U.S. 37, 45 (1983); *see also Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality); *cf. Schenck*, 519 U.S. at 377 ("speech in public areas is at its most protected on *public sidewalks*, a prototypical example of a traditional public forum") (emphasis added). "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz,* 487 U.S. 474, 481 (1988).[8]

IV. Section 18-9-122(3) Fails Constitutional Scrutiny.

The constitutional standards governing restrictions on the right to freedom of speech on the public ways and sidewalks within 100 feet of the entrances to health care facilities, are well-established:

> In these quintessential public fora, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

8. The State conceded this point, as well. *See* JA at 277 ("[a]dmitted" that "publicly owned sidewalks within 100 feet of the entrance to a health care facility are traditional public forums").

Frisby, 487 U.S. at 481 (editing marks omitted; quoting *Perry,* 460 U.S. at 45). Furthermore, "[c]riminal statutes must be scrutinized with particular care," *City of Houston*, 482 U.S. at 459; therefore, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley v. National Fed'n of the Blind,* 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

A statutory ban on leafletting, sign displays, and oral education, protest, and counseling, on public sidewalks, is unconstitutional. *See, e.g., Thornhill v. Alabama,* 310 U.S. 88 (1940) (place of business); *Grace,* 461 U.S. 171 (courthouse); *Grayned,* 408 U.S. at 119 (school); *Boos,* 485 U.S. 312 (embassy). Petitioners' expressive activities on public sidewalks are classic exercises of the right to free speech. No valid government interest supports Colorado's restrictions on speech. Indeed, this Court has pointedly noted, "[a] ban on handbilling . . . would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate," *Ward v. Rock Against Racism,* 491 U.S. 781, 799 n.7 (1989). Because Colorado's ban encompasses so much speech unrelated to any regulable evil, its "complete ban on handbilling [is] substantially broader than necessary to achieve the interests justifying it." *Id.*[9]

Colorado cannot justify restrictions on peaceful expression on the basis of the supposed offensiveness of petitioners' message to some viewers. "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed,

9. The Colorado Court of Appeals construed C.R.S. § 18-9-122(3) to impose just such a flat ban. *See* Pet. App. 56a ("with reference to the fact that leafletting may not take place within 100 feet of the entrance to the medical clinic unless consent is given, we view the significant governmental interest here as sufficient to warrant the requirements of the statute").

if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (editing marks and citations omitted).

Nor can access concerns justify a flat ban on, for example, displaying a placard outside a health care facility.[10] A solitary pedestrian walking on a public sidewalk distributing leaflets, displaying a sign, or communicating orally does not automatically prevent access.[11] Nor is a blanket ban on leafletting, sign displays, and oral expression without advance

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10. Because the challenge provision does not target obstructive conduct, or unprotected expression, such as fighting words or threats that are independently proscribable and that may interfere with access, it is disingenuous to describe the governmental interest to which the statute is directed as ensuring access to health care facilities. *But see* C.R.S. § 18-9-122(1), Pet. App. at 64a-65a. The statute only restricts communications. Consequently, it is likely that the actual purpose of the statute is to insulate others from opinions and views with which they may disagree. The court below stated that it was seeking to balance *freedom of expression* with the *constitutional right of privacy*. Pet. App. 14a. That approach is fundamentally flawed. First, this Court has expressed real "doubt that . . . 'the right of the people approaching and entering the facilities to be left alone'–accurately reflects our First Amendment jurisprudence in this area," *Schenck*, 519 U.S. at 383 (citing *Madsen*). Second, the statute restricts only *communicative* approaches; hence, the "privacy" in question is not physical solitude, or freedom from government interference with personal decisions, but freedom from *messages*.

11. If an individual actually interfered with public passage, then the proper approach would be to enforce relevant criminal laws such as C.R.S. § 18-9-122(2), which directly prohibits obstructive conduct. *Infra* note 13. Such laws may not be selectively invoked as a pretense for suppressing an objectionable message. *See, e.g., Coates v. Cincinnati*, 402 U.S. 611 (1971).

consent narrowly drawn to address access concerns. The expressive activities burdened by the statute are no more obstructive than countless other activities, such as strolling with a friend, walking with a cane, stopping to talk with friends, walking a dog, riding in a wheelchair, etc. The expressive activities targeted by C.R.S. § 18-9-122(3) are not the "evil" – obstruction of access – that motivated the General Assembly to enact the statute. *Cf. Frisby*, 487 U.S. at 485 ("complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil"). Finally, if access concerns could justify these burdens on freedom of expression outside of health care facilities, the same rationale would apply to such activities outside *any* business or government facility. Free speech would be a mere shadow.[12]

If Colorado is concerned with disturbing noises, it is free to enact and enforce a noise control statute. If the problem is obstructive or disorderly conduct, there are laws tailored to such conduct.[13] But the face of C.R.S. § 18-9-122(3) reveals a different and profoundly disturbing purpose: to suppress uninvited *messages*. The Constitution protects the petitioners against such censorship. *Simon & Schuster*, 502 U.S. at 118

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12. Colorado may not, "by its own ipse dixit[,] destroy the 'public forum' status of streets and parks which have historically been public forums . . . ." *U.S. Postal Service v. Greenburgh Civic Ass'n*, 453 U. S. 114, 133 (1981); *see also Grace*, 461 U.S. at 179-80.

13. Colorado has numerous laws directly targeting unprotected conduct. *See, e.g.*, C.R.S. § 18-3-202 (assault, first degree); C.R.S. § 18-3-203 (assault, second degree); C.R.S. § 18-3-204 (assault, third degree); C.R.S. § 18-9-106 (disorderly conduct); C.R.S. § 18-9-107 (obstructing passage); C.R.S. § 18-9-111 (harassment–stalking); C.R.S. § 18-9-114 (hindering transportation); C.R.S. § 18-9-122(2) (obstructing access to health care facilities); C.R.S. § 18-13-107 (interference with persons with disabilities).

(and cases cited); *Street v. New York*, 394 U.S. 576, 592 (1969).

A. C.R.S. § 18-9-122(3) is Overbroad

C.R.S. § 18-9-122(3) is unconstitutionally overbroad.[14] Every person passing within 100 feet of any entrance door to every health care facility in Colorado is enveloped by a speech free bubble with an eight foot radius. The zones surround persons having no present business with, or interest in, the hospitals, clinics, labs, diagnostic facilities, ambulatory surgical centers, outpatient mental health facilities, and the offices of general practitioners and medical specialists.[15] The operation

14. In the usual facial challenge based on overbreadth, a court must determine whether the overbreadth of a statute is substantial. *E.g.*, *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (citing cases). That analysis is appropriate to statutes that imperfectly address a valid core of conduct that is subject to proscription or regulation, and the question is whether the restriction also restricts a substantial amount of free speech. *Id.*; *Secretary of State v. J.H. Munson Co.*, 467 U.S. 847, 864-65 (1984).

> *Substantial overbreadth* is a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner. It is appropriate in cases where, despite some possibly impermissible application, the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .

Munson, 467 U.S. at 864-65 (emphasis added). The "substantial overbreadth" test does *not* apply, however, where "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Id.* at 865-66. In such a case, the statute is facially unconstitutional, and no inquiry into the substantiality of other overbroad applications is necessary. *Id.* In this case, C.R.S. § 18-9-122(3) is unconstitutional regardless of which overbreadth standard applies. In every obvious application of the statute, protected expression is criminalized.

15. The foregoing examples are only the *obvious* ones, but the statute creates similar floating speech free zones outside the entrance doors to "any entity that is licensed, certified, or otherwise authorized or *permitted* by law

of the zones, conditioning communication on consent, is not limited to persons with a history of bad conduct; Colorado assumes that no one can be trusted to communicate in these circumstances without abusing his constitutional rights.[16]

As in *Secretary of State v. J. H. Munson Co.*, 467 U.S. 847 (1984), "[t]he flaw in the [Colorado] statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise," 467 U.S. at 966. Colorado has ignored this Court's teaching that "[t]he Constitution does not allow such speech to be made a crime." *City of Houston*, 482 U.S. at 462. The false premise here is that the State may subject *all* expression in public fora to a "heckler's license."

The only activities "reached" by the statute are paradigmatic forms of constitutionally protected expression: leafletting, sign displays, oral utterances. C.R.S. § 18-9-122(3) is overbroad because it "imposes a direct restriction on protected First Amendment activity" and the "means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech." *Munson*, 467 U.S. at 967-68 (footnote and citation omitted).

> Colorado Revised Statute § 18-9-122(3) violates the constitutional right of free assembly and association. [This Court's] decisions establish that mere

to administer medical treatment" in Colorado. *See* Pet. App. 65a, C.R.S. § 18-9-122(4). And in every case (other than certain abortion clinics) these zones were imposed without any evidence of a problem regarding access, and without any demonstrated need for the vast reach of the Statute.

16. Although the Colorado Supreme Court accepted, Pet. App. 10a, that petitioners had not engaged in such abuses, it recognized that the legislature attributed such abuses generally to anti-abortion protestors, *id.*

> public intolerance or animosity cannot be the basis for the abridgment of these freedoms. . . . The First and Fourteenth Amendments do not permit [Colorado] to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people.

Coates, 402 U.S. at 615.

That Colorado's statute operates in the vicinity of every health care facility in that State, rather than *everywhere* cannot salvage the statute. A restriction is no less unconstitutional because it only applies in certain locales, such as airports, *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 570-71 (1987), public school buildings, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or the Supreme Court grounds, *Grace*.

C.R.S. § 18-9-122(3) is overbroad because it "does not aim specifically at *evils within the allowable area of State control* but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill,* 310 U.S. at 97 (emphasis added). Such an "overbroad"[17] law "directly restricts protected expression activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Munson*, 467 U.S. at 965 n.13. Colorado's statute flies in the face of established doctrine: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley v. National Fed'n of the Blind,* 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

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17. The term "overbreadth" has two distinct meanings in constitutional law. *Munson,* 467 U.S. at 965 n.13. Petitioners use the term to describe "a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *See id.* (citation omitted).

Such precision results only from careful legislative effort to draw a statute narrowly to the service of a government interest. A law is "narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby,* 487 U.S. at 485 (citation omitted). By contrast, C.R.S. § 18-9-122(3) is overbroad – not narrowly tailored – because "there is no core of easily identifiable and constitutionally proscribable conduct that the [law] prohibits." *Munson,* 467 U.S. at 965-66.

C.R.S. § 18-9-122(3) bans virtually the universe of protected expression, including displays of signs, distribution of literature, and mere verbal statements. *Cf. Board of Airport Comm'rs,* 482 U.S. at 574 (regulation "reaches the universe of expressive activity, and . . . prohibit[s] *all* protected expression").

An important signal that C.R.S. § 18-9-122(3) is overbroad is that "the enforceable portion of the [statute] deals not with core criminal conduct, but with speech." *City of Houston*, 482 U.S. at 460. The "core" of Colorado's statute is free expression, and it is free expression that Colorado has treated as a "targeted evil." Nor is the statute narrowly drawn to restrict only the bad acts of wrongdoers (as in the cases of an injunction or a recidivism statute). *See* Pet. App. 10a n.7.

C.R.S. § 18-9-122(3) is much more sweeping than the ordinances struck down in *Houston* and in *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). Houston's ordinance only prohibited speech that "'in any manner . . . interrupt[s] an officer.'" 482 U.S. at 461. New Orleans' ordinance forbade "'any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" 415 U.S. at 132. In contrast, C.R.S. § 18-9-122(3) applies to *all* leafletting, *all* sign displays, and *all* oral utterances which

constitute education, counsel or protest. "The Constitution does not allow such speech to be made a crime." *City of Houston*, 482 U.S. at 462. Petitioners "are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *Federal Election Comm'n v. National Conservative PAC*, 470 U.S. 480, 501 (1985).

C.R.S. § 18-9-122(3) is even more flagrantly unconstitutional than the "floating," consent-to-speak restrictions struck down in two recent decisions by this Court. *Schenck*, 519 U.S. at 367; *Madsen*, 512 U.S. at 773-74. In *Madsen*, the provision this Court struck down was limited so that the defendants in that case were unable to approach "any person seeking the services of the Clinic" without consent. 512 U.S. at 773. In *Schenck*, the provision this Court struck down was limited so that the defendants in that case were required to give way to "persons entering or leaving, working at or using any services at any facility at which abortions are performed" in the Western District of New York. 514 U.S. at 367 (emphasis added). Notably, the *Madsen* and *Schenck* injunctions only restricted those persons whose previously adjudicated misconduct warranted the entry of injunctive relief.[18]

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18. The court below fundamentally erred when it held, simplistically, that identical restrictions in a statute face less demanding scrutiny than in injunctions. True enough, *Madsen* directs that injunctive restrictions on expressive activity face "a somewhat more rigorous standard," 512 U.S. at 765-67; *but cf. Madsen*, 512 U.S. at 778 (Stevens, concurring and dissenting) (concluding that, because "legislation is imposed on an entire community, regardless of individual culpability," "injunctive relief should be judged by a more lenient standard than legislation") (citation omitted). But *application* of the standard also differs. An injunction, by its nature, restricts only those already found to have engaged in (or threatened to engage in) unlawful activity, while a statute restricts *everyone*, no matter how innocent. As a consequence, just because a record of extraordinary misconduct may justify exceptional restrictions on free speech (e.g., a "stay away" order in a domestic dispute or stalking case), by no means would such restrictions pass muster in a statute of general applicability, even under a "less rigorous" test.

By contrast, in Colorado, a speech-free bubble envelopes every man, woman, and child, regardless of their destination or purpose, who passes within 100 feet of every entrance door to every health care facility in Colorado. The bubble is not limited to patients, families or companions of patients, employees of such facilities, physicians, nurses, or other health care personnel, or business associates. Instead, speech-free bubbles enshroud all those present on the public ways or sidewalks who happen to be within 100 feet of the entrance to a "health care facility." Businessmen walking to a lunch counter, construction workers leaving a work site, families taking a leisurely stroll to a popular landmark, all are enveloped by zones that are purportedly designed to secure access to health care facilities. Moreover, the obligation to obey the statute and respect the speech-free bubbles applies to everyone, whether they have engaged in any misconduct upon which liability could be imposed or not. "[N]o conceivable governmental interest would justify such an absolute prohibition of speech." *Board of Airport Comm'rs*, 482 U.S. at 575.

B. Section 18-9-122(3) Imposes an Unconstitutional Prior Restraint.

Section 18-9-122(3) is a prior restraint. As with any other classic prior restraint, under the Colorado statute, speech can proceed if permission is granted, but will result in criminal liability if permission is denied. The statute restrains and inhibits speech before it takes place, and subjects such speech

to the permission of a person deputized by the state.[19] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Respondents have contended that the speech licensing system C.R.S. § 18-9-122(3) imposes is not a prior restraint because the challenged statute grants licensing authority to private citizens.[20] Despite that contention – "whether ingenious[] or

19. This Court has held that "the regulations we have found invalid as prior restraints have had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Ward*, 491 U.S. at 795 n.5 (internal quotation marks and citation omitted).

20. This Court has indicated that governmental grants of censorial power to private actors are constitutionally problematic. In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997), this Court rejected a narrowing construction of the Communications Decency Act proffered by the Government because "[i]t would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child, a 'specific person . . . under 18 years of age,' would be present." *Reno*, 521 U.S. at 880 (citation omitted). *Cf. Larkin v. Grendel's Den*, 459 U.S. 116, 122, 127 (1982) (faulty state scheme to donate powers usually exercised by state to churches for their "unilateral and absolute" use). *Reno* and *Larkin* guide analysis of the present case, in which licensing powers normally reserved to a governmental agency have been transferred over to the unilateral and absolute power of private persons. *See also Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958) ("[t]he controlling legal principles are plain. . . . [C]onstitutional rights . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously'") (quotation marks and citations omitted); *cf. Evans v. Newton*, 382 U.S. 296, 299 (1966) ("[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action"); *Burton v. Wilmington*

ingenuous[]," *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) – C.R.S. § 18-9-122(3) falls neatly within the prior restraint doctrine. The statute compels speakers to obtain consent to speak and it authorizes private citizens to deny petitioners' requests to engage in expressive activities. Behind that authority is the State's criminal law enforcement mechanism. With consent, all is well for the would-be speaker. Without consent, petitioners and other citizens leaflet, speak or display signs at the peril of criminal prosecution for a class 3 misdemeanor.[21]

Under the Constitution, Colorado's statutory speech licensing scheme is clearly defective. This scheme neither has nor is capable of providing any of the procedural safeguards identified by this Court as prerequisites to the imposition of an otherwise unconstitutional prior restraint. Far from solving the constitutional problems, Colorado's attempt to circumvent prior restraint doctrine by delegating censorship powers to individuals makes matters worse by removing any possibility of procedural safeguards.

1. The Statute Grants Unbridled Discretion to Speech Licensors.

C.R.S. § 18-9-122(3) assigns to private citizens unlimited power, enforced by the State, to grant or deny a request for permission to distribute literature, display a sign, or engage in oral protest, oral counseling, or oral education. "[A] law

Parking Authority, 365 U.S. 715, 726 (1961) ("when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself").

21. In fact, Colorado has admitted that, under its statute regime, "signs, pamphlets and/or literature" could constitute "the evidence of a violation" because they were "used in the commission of the offense." JA 280.

subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).[22] Nothing in the statute curtails its application to protected speech; rather, C.R.S. § 18-9-122(3) precisely and deliberately targets protected expression.

C.R.S. § 18-9-122(3) grants unbridled discretion to those from whom speakers must obtain permission to speak. Under the law, passersby may deny petitioners the right to speak because of petitioners' race, gender, content of their speech, opinions, hair color, or for no reason at all. Colorado has codified a speech licensing approach that other locales may want to duplicate. Officials in Skokie, Illinois, or Cummings, Georgia, may conclude that those who reside along a parade route should have the right to decide whether a parade or demonstration permit will be granted. *Cf. National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). For that matter, Colorado could cripple the initiative process by banning circulators from approaching qualified voters without advance consent. *Cf. Meyer v. Grant*, 486 U.S. 414 (1988).

There is no workable means of curing such boundless discretion by imposing an external review process because "[e]ven if judicial review were relatively speedy, such review cannot substitute for concrete standards to guide the decision

22. This Court has "previously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988).

maker's discretion." *City of Lakewood*, 486 U.S. at 771.

2. Section 18-9-122(3) Lacks the Necessary Procedural Safeguards

C.R.S. § 18-9-122(3) lacks the procedural safeguards required of a licensing scheme. Such safeguards reflect the significance of expressive freedoms. *Cf. Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.12 (1986) ("procedural safeguards often have a special bite in the First Amendment context. The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns") (citations omitted). The courts below concluded that the statute did not impose a prior restraint upon expression. Consequently, no effort was given to scrutinizing the nature of the restraint imposed to determine whether the constitutional requisites identified by this Court, *see, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Riley*, 487 U.S. at 802, were included in the scheme.

In fact, it is doubtful that a workable system of restraints employing private parties as licensors could be crafted that would pass constitutional muster. In the present case, however, it is clear that none of the requisite safeguards were included in the prior restraint scheme imposed by C.R.S. § 18-9-122(3). Thus, the statute fails constitutional scrutiny.

C. C.R.S. § 18-9-122(3) Unconstitutionally Discriminates Based on Content and Viewpoint of Expression.

1. C.R.S. § 18-9-122(3) is content-based.

The challenged statute is content-based on its face with regard to oral utterances. C.R.S. 18-9-122(3) applies to *all* leafletting and to *all* sign displays, *but only applies to* those *spoken* exercises of the right to freedom of speech that

constitute *"education," "counseling," or "protest."*[23] No prosecution arising from an unconsented oral utterance could succeed without evidence being tendered of what a speaker had said. Consequently, the content of oral speech must be taken into account in determining whether the statutory ban was violated.[24] When "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," the law is plainly content-based, *Carey v. Brown*, 447 U.S. at 462. Thus, the statute is subject to strict scrutiny. *See, e.g., Turner Broadcasting System v. FCC*, 512 U.S. 622,

23. For example, suppose two women march along a sidewalk within 100 feet of a health care facility, deliberately approaching within 8 feet of a man headed to the facility to have a disfiguring wart removed. Without obtaining consent, one says, "Good morning," while the second tells passersby, "Natural is best, don't put plastic surgery to the test." The second woman would be violating Colorado law (if permission is not obtained), but not the first woman – yet the only difference is the content of the message.

Or suppose two lab technicians on a coffee break while working at a community hospital, are walking over to a smokers' hospitality zone and, while within 100 feet of the entrance to the hospital they deliberately approach within 8 feet of a third person. Without first asking consent, one man recites a few lines of *Jabberwocky* by Lewis Carroll, and the second declares, "I object to the hospital board's penurious treatment of staff." The second man would be guilty of uttering an oral protest, while the first man presumably would not.

24. Colorado has contended that content is irrelevant to the statute's restriction on oral communications. JA 291-96. The only way that this could be true would be if *all* oral communication were deemed to be "protest, education, or counseling." Under this construction, the statute would restrict "the universe of [oral] expressive activity," *Board of Airport Comm'rs*, 482 U.S. at 574, rendering the provision undeniably overbroad, *id.* at 575.

641-43 (1994).[25] The Colorado statute is also content-based, as to leafletting, sign displays, and oral utterances, because it subjects the right to free speech to the listener's reaction. *Forsyth County*, 505 U.S. at 134.

Not only does the statute embody direct content discrimination as described above; by its omission of clear standards prohibiting citizens from denying speakers the right to speak based on disagreement with content or viewpoint, C.R.S. § 18-9-122(3) authorizes private citizens to decide whether expression may take place on the basis of content. Criminal liability will hinge on whether consent is obtained. The statute leaves it to private actors to decide whether consent will be granted. In these circumstances, it is hard to imagine that consent will turn on anything other than content and viewpoint of the proposed expression. The State's careless deputization of private citizens permits content- and viewpoint-based discrimination. Thus, the statute is subject to strict scrutiny.

2. Content-based restrictions are presumptively unconstitutional

Content-based restrictions on leafletting, picketing, and oral protest, counseling, or education fail to meet the strict governing constitutional standards:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is

25. C.R.S. § 18-9-122(3) also is "an absolute prohibition on . . . particular type[s] of expression[,]" *Grace*, 461 U.S. at 178; thus, it is subject to strict scrutiny. Moreover, that the statute discriminates on the basis of content raises equal protection grounds for invalidation. *See, e.g., Police Dep't v. Mosley*, 408 U.S. 92, 94 (1972).

content control . . . .

> Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Mosley, 408 U.S. at 95-96; *accord Carey,* 447 U.S. at 462-63.[26] The ban on oral protest, counseling or education is openly content-based. The lawfulness of a given utterance in the first instance depends on whether its content constitutes oral education, oral protest, or oral counseling.

This is raw censorship for which the interest in access to health care facilities cannot be sufficient. Under this Court's decisions striking down content-discriminatory statutes, *see, e.g., Carey, Boos*, and *Reno,* C.R.S. § 18-9-122(3) is grossly unconstitutional because it discriminates on the basis of the content of speech in public places.

3. No conceivable government interest, let alone one that is compelling, justifies Colorado's decision to secure access to health care facilities by suppressing freedom of expression in the traditional public forum.

The State's ostensible interest in protecting access to health care facilities does not justify the raw censorship which C.R.S. § 18-9-122(3) imposes.

The Colorado General Assembly enacted C.R.S. § 18-9-122 purportedly to balance "the exercise of a person's right to

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26. This Court concluded that the injunctions in *Madsen* and *Schenck* were not *content*-based. The difference between the present statute and those injunctions is that the injunctions were crafted, albeit ineptly, to remedy the continuing problems of persons adjudicated to have engaged in continuing misconduct. *Madsen*, 512 U.S. at 763; *Schenck*, 519 U.S. at 380.

protest or counsel against certain medical procedures . . . against another person's right to obtain medical counseling and treatment in unobstructed manner," C.R.S. § 18-9-122(1). The Colorado Supreme Court also identified the right to privacy of persons seeking treatment as the purpose of C.R.S. § 18-9-122(3). *See* Pet. App. 14a-16a. These same purposes animated the floating bubble zone at issue in *Schenck* and the no approach zone in *Madsen*.[27] Despite comparable interests, described in *Schenck* as significant, *id.* at 376, this Court struck down the floating bubble zone, *Schenck*, 519 U.S. at 377, just as it had done with the "consent to speak" provision of the *Madsen* injunction, 512 U.S. at 773-74. No other result can be justified here.

Moreover, the interest Colorado asserts and that the court below found sufficient in "balancing" away free speech rights is not *legitimate* for purposes of constitutional review:

- the interest is *not* unrelated to suppressing expression, *see United States v. O'Brien*, 391 U.S. 267, 377 (1968), but rather targets speech directly and deliberately.
- the right to privacy – which only protects against government action – is not jeopardized by the expressive activities of private citizens communicating to passersby in the traditional public forum, *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993);[28] *cf. Erznoznik v. City*

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27. *See Schenck*, 519 U.S. at 360-65, 367, 369, 376; *Madsen,* 512 U.S. at 757-59, 767-68.

28. As this Court explained in *Schenck*, 519 U.S. at 383:

> "[w]e doubt that the District Court's reason for including that provision–'to protect the right of the people approaching and entering the facilities to be left alone'–accurately reflects our First Amendment jurisprudence in this area. Madsen sustained an injunction designed to secure physical access to the clinic, but not on the basis of any

of Jacksonville, 422 U.S. 205, 208-12 (1975) (concluding that privacy rights of passersby did not justify ordinance restricting *all* public theatrical displays of motion pictures containing scenes with nudity).

• the suppression of even peaceful speech in a public forum cannot qualify as a legitimate interest. *Grace*, 461 U.S. at 182. Hence, no relevant, valid interest supports the Colorado statute.[29]

4. Even if securing access to health care facilities constitutes a compelling government interest, C.R.S. § 18-9-122(3) is not narrowly drawn to serve that interest.

Even short of a total ban, regulation of speech activity in public fora is "subject to the highest scrutiny." *ISKCON v. Lee*, 505 U.S. 672, 678 (1992); *accord United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality). A restriction on leafletting, picketing, or meaningful oral expression is therefore unconstitutional unless it can satisfy the "stringent standards" governing "restrictions on speech in traditional public fora." *Frisby*, 487 U.S. at 481. In particular, a "content-based exclusion," is impermissible unless the government can "show that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Id.* (internal quotation marks and citation omitted). Despite the assertion

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generalized right 'to be left alone' on a public street or sidewalk."

29. Freedom of speech cannot be made subject to prevailing notions of taste or to preferences for particular forms of expression: "so long as the means are peaceful, the communication need not meet standards of acceptability." *Organization for a Better Austin*, 402 U.S. at 419. Just as Colorado is without power to "protect" private citizens from "offensive" or controversial speech, so too is it without power to prohibit speech to avoid disharmony. *Cf. Boos*, 485 U.S. at 321 ("[t]he emotive impact of speech on its audience is not a 'secondary effect'").

that C.R.S. § 18-9-122(3) is necessary to ensure access to health care facilities, the statute is not confined to obstructive conduct, or to expressive activities that are unprotected and obstructive. *Cf. Madsen*, 512 U.S. at 774 ("[t]he 'consent' requirement . . . burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic"); *Schenck*, 519 U.S. at 377 ("because this broad prohibition on speech 'floats,' it cannot be sustained on this record").

The use of a consent to speak provision demonstrates that the statute is not narrowly drawn to any valid state interest, *see supra* § IV(A). The statute rests the ultimate decision on consent, and the consequent determination of whether speech is criminal or free, on the judgment of the prospective listener. Unfettered discretion is not evidence that a statute has been drawn narrowly. The prospective listener will likely decide whether speech may be uttered for reasons far removed from the government's purportedly compelling interest. Instead, decisions will turn, unsurprisingly, on whether the speech is *welcome* or *unwelcome*. Such a regime cannot be squared with the Constitution.

E. C.R.S. § 18-9-122(3) does not Survive Scrutiny as a Regulation of Time, Place and Manner of Speech.

Even if time, place and manner analysis provides the appropriate standard, C.R.S. § 18-9-122(3) cannot qualify as a reasonable time, place and manner regulation.

1. The ban on all unconsented oral protest, counsel and education, on all unconsented sign displays, and on all unconsented leafletting is not reasonable.

In *Madsen*, 512 U.S. at 773-74, this Court struck down an injunctive provision that barred the *defendants* in that case from approaching *persons seeking access to the facility* to speak with them without first receiving from such persons an indication of

their "desire to communicate." In that case, the trial court had confronted demonstrators whose persistent conduct obstructed access to an abortion clinic. *Id.* at 758-59. Nonetheless, this Court concluded that the "consent to speak provision" was untenable because "it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.*

Here, Colorado has identified obstructing access to health care facilities as the evil it sought to avert by enactment of C.R.S. § 18-9-122(3). *See* Pet. App. 64a-65a. But C.R.S. § 18-9-122(3) does not restrict obstructive conduct. Nor is the statute limited to expression accompanied by obstructive conduct. Nor is it drawn only to limit fighting words or threats, which are independently proscribable. *Cf. Madsen*, 512 U.S. at 774. Colorado has set out a standard for engaging in protected expressive activities that requires petitioners to assume a death-mask of passivity.[30] The judgment of the Colorado General Assembly, embodied in C.R.S. § 18-9-122(3), was simply unreasonable and untenable.

Indeed, the challenged provision is *counter productive* to its supposed justification. By imposing a consent-to-communicate requirement, Colorado converts every meaningful communication into, at first, a solicitation of consent. As a

30. The Colorado Supreme Court construed C.R.S. § 18-9-122(3) to be inapplicable to leafletting, sign displays, and oral communications so long as "petitioners stand still while inside the floating buffer zone." Pet. App. 21a. But if petitioners communicate without having consent and their movement within eight feet of another constitutes a *knowing* approach while within the multitudinous floating zones created under the statute, they risk arrest and prosecution under the statute. Such burdening of communication makes a parody of free speech.

consequence, pristine expression normally considered undisruptive and nonthreatening is converted into a transaction that disrupts passage. *Cf. Kokinda*, 497 U.S. at 734 ("[a]s residents of metropolitan areas know from daily experience confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information").

2. The ban on freedom of expression is not narrowly tailored.

Other than a ban on "all First Amendment activities,"[31] it is difficult to imagine a law less narrowly tailored than C.R.S. § 18-9-122(3). The court below erred in concluding otherwise. *See supra* § IV(A).

First, C.R.S. § 18-9-122(3) restricts speech, not conduct. The Colorado Supreme Court concluded that the General Assembly adopted C.R.S.§ 18-9-122(3) out of concern for public safety issues regarding the conduct of some protesters at various health care clinics that was directed at both patients and staff. Pet. App. 14a-15a. C.R.S. § 18-9-122(3), however, prohibits only constitutionally significant speech and expression; that provision leaves unfettered obstructive and threatening conduct. *See* C.R.S. § 18-9-122(3) ("passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling"). Thus, although the court below concluded that the general assembly acted to prohibit *obstructive conduct*, the statute imposes direct restrictions only on protected speech. C.R.S. § 18-9-122(3) does "not aim specifically at evils within the allowable area of [Colorado's] control but, on the contrary, sweeps within its ambit other activities that . . . constitute an exercise of freedom of speech or of the press." *Thornhill*, 310

31. *Board of Airport Comm'rs*, 482 U.S. at 570 (regulation prohibiting all "First Amendment" activities in airport terminal overbroad).

U.S. at 97. Because the statute restricts expression rather than obstruction, it is not narrowly tailored.[32] *Supra* § IV(A). "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to insure access to the clinic." *Madsen*, 512 U.S. at 774.

Second, the requirement of obtaining consent to speak is not limited to health care patients and their families, staff, and those with business at health care facilities. Petitioners' expressive activities are not limited to one-on-one communications. Rather, their leafletting, sign displays, and oral communications are directed to all passersby as well as to women seeking abortions and their companions. JA 49-51, ¶¶ 7, 10, 12-13; JA 53, ¶¶ 7-9; JA 55, ¶¶ 6-8. Respondents may argue that petitioners are not required to seek consent from everyone in their vicinity in order to speak, asserting that the only persons from whom consent must be obtained are the individual targets of petitioners' expressive activity. Under that construct, however, petitioners, because they seek to communicate generally to the public, *see* JA 49-51, ¶¶ 7, 10, 12-13; JA 53, ¶¶ 7-9; JA 55, ¶¶ 6-8, are required to obtain consent from every passerby or bystander before coming within eight feet of them because every one of them is the target of petitioners' communications. Neither *Madsen*'s "consent to speak" provision nor *Schenck*'s "floating bubble zone" were so overbroad, yet both were held to violate the Constitution.

The injunction in *Schenck* only applied in the vicinity of

32. The restriction on leafletting adequately evidences the fact that C.R.S. § 18-9-122(3) is not narrowly tailored. Time and again, this Court has warned against even time, place and manner restrictions on that activity. *See, e.g., Ward*, 491 U.S. at 799 n.7 ("[a] ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate").

abortion facilities in the Western District of New York. *Schenck*, 519 U.S. at 367. C.R.S. § 18-9-122(3) is not so limited. The statute creates floating speech free zones outside every hospital, every doctor's office (whether general practitioners or specialists), every ambulatory surgical center, every public health facility, every urgent care business, every diagnostic services or laboratory services facility, in Colorado.[33]

Nor is the Statute's scope limited to the foregoing matters. The *Schenck* injunction offered its limited protection only to those seeking to use or provide the services of the protected medical facilities. *Schenck*, 519 U.S. at 367 n.3.[34] Colorado's statute creates speech-free, floating bubbles around every human being within 100 feet of the entrance to any health care facility in Colorado. These zones surround tradesmen walking to local lunch counters, simply because of the happenstance that their routes pass near the doorway to dentists' offices or county health departments. These zones surround out-of-state tourists walking to the United States Mint in Denver, simply because they parked in a garage that exits onto a sidewalk running adjacent to a health care facility. These zones surround vehicles driving nearby when petitioners or others walk along a sidewalk at curbside in order to display their signs to those driving past. The list of those covered by this statute — because it is disconnected from the provision of or need for

33. Morever, unlike *Schenck*, 519 U.S. at 360-65, where an adjudicated record of misconduct by identified parties led to imposition of injunctive restrictions in places for which demonstrable problems of access existed, C.R.S. § 18-9-122(3) restricts petitioners' (and everyone else's) rights in the absence of any record evidence of misconduct by them at all.

34. Similarly, the injunctive floating bubble zone in *Madsen* was limited in its protective scope to those seeking access to the Aware Women's Health Center in Melbourne, Florida. *See Madsen*, 512 U.S. at 773.

health care services — is as long as the list of those who live in, or visit, Colorado.

Moreover, if C.R.S. § 18-9-122(3) is intended to secure access to health care facilities, imposing on speakers a requirement that they obtain consent from all persons who are in the vicinity of health care facilities is certainly not narrowly tailored. For example, in *Schenck*, the floating bubble zone only enveloped and protected those persons entering or leaving the medical facilities. 519 U.S. at 367 n.3. Unlike the *Schenck* injunction, floating speech-free zones engulf every person who passes by any health care facility in the State within 100 feet of its entrance doors. These zones absorb persons whose presence is not a function of health care needs or the provision of health care services. Rather, because the challenged statute is indiscriminate, its speech-free zones envelope everyone who, by happenstance of geography, employment or otherwise, passes near health care facilities without any intent to use them.

Third, another provision of the same statute demonstrates that C.R.S. § 18-9-122(3) is not narrowly tailored to secure access to health care facilities. C.R.S. § 18-9-122(3) is but one provision of the legislation enacted by the General Assembly. The General Assembly also enacted C.R.S. § 18-9-122(2): "[a] person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility." Unlike C.R.S. § 18-9-122(3), the offense described by C.R.S. § 18-9-122(2) actually addresses – and seeks to ensure – access to health care facilities. Given the direct ban on conduct that "obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility," the superfluity of C.R.S. § 18-9-122(3) as a means of securing access to health care facilities is patent. Thus, the statute is

demonstrably not narrowly drawn because other means already protect the interest the State ostensibly seeks to protect.

3. C.R.S. § 18-9-122(3) does not leave open ample alternative channels of communication.

No alternative channel of communication exists allowing petitioners effectively to express their messages to, and associate with, those members of the public who are seeking access to the very health care facilities whose operations concern petitioners. The Colorado Court of Appeals clearly understood one implication of the statute, namely that *all handbilling* within one hundred feet of the entrance doors to every Colorado health care facility would be banned under the statute. Pet. App. 56a-57a ("[f]inally, with reference to the fact that leafletting may not take place within 100 feet of the entrance to the medical clinic unless consent is given, we view the significant governmental interest here as sufficient to warrant the requirements of the statute"). Nonetheless, that court upheld the statute's constitutionality and, in its turn, the Colorado Supreme Court affirmed that judgment. Pet. App. 3a.

The judgment affirmed below had concluded that the statute left open "ample alternative channels of communication other than leafletting," including "speech for those without hearing disabilities, placards for those with hearing deficiencies, and other visual items for the sighted patients and staff." Pet. App. 57a. This conclusion is wrong, and the cavalier analysis that led to it is unprecedented. In essence, the court below justifies the substantial burdens of the statute by telling picketers to use their voices, speakers to use signs, leafletters to call out from a distance, and everyone to relinquish that most sacred archetype of free speech and free press, the hand-to-hand distribution of free literature.

Whatever the meaning of "ample alternative channels of

communication," the constitutional principle is well-established: "as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 160-61 (1939).

In *City of Ladue v. Gilleo*, 512 U.S. 43, 55-56 (1994), this Court rejected a ban on signs displayed on one's own property. The City defended its ordinance on the basis that "residents remain[ed] free to convey their desired messages by other means, such as hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches and neighborhood or community meetings." 512 U.S. at 56. This Court was not "persuaded that adequate substitutes exist for the important medium of speech that Ladue had closed off." *Id.*

Here, "adequate substitutes" do not exist for the oral communications, sign displays, and hand-to-hand distribution of leaflets that the State of Colorado has closed off. *Cf. Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (leafletting, sound trucks, demonstrations, and the like, are less likely to reach intended audience and are less effective than the real estate "For Sale" signs prohibited under the challenged ordinance); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (same). The appeals court's "ample alternative channels" conclusion flies in the face of the constitutional rights of free expression: "That [a regulation] leave open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). This is so because, "[t]he First Amendment protects [speakers'] right not only to

advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.*

The courts below erred in concluding that the statute preserved ample alternative channels of communication.

F. C.R.S. § 18-9-122(3) Is Unconstitutionally Vague.

C.R.S. § 18-9-122(3) is unconstitutional because it employs terms that are so "vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). C.R.S. § 18-9-122(3) does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. While all laws must be reasonably clear, laws which regulate or restrict free speech, such as § 18-9-122(3), must satisfy "a more stringent vagueness test," *Village of Hoffman Estates*, 455 U.S. at 499 (footnote omitted).

Moreover, because of this statute's ambiguous breadth, the concern arises that violations will be defined by subjective, varying, ad hoc judgments. That concern is exacerbated here, where private citizens are empowered to license speech. *Grayned*, 408 U.S. at 108-09. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801 (internal quotation marks and citations omitted). This Court has counseled:

> [v]ague laws offend several important values. First, . . . [v]ague laws may trap the innocent by not providing fair warning. Second, . . . [a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. Third, . . . where a vague statute abuts upon sensitive areas of basic First Amendment

freedoms, it operates to inhibit the exercise of those freedoms.

Grayned, 408 U.S. at 108-09 (footnotes and editing marks omitted). *Accord Village of Hoffman Estates*, 455 U.S. at 498.

Applying C.R.S. § 18-9-122(3) to peaceful sign displays, to leafletting, or to oral communications, on a public sidewalk raises a host of thorny interpretive questions. No arbitrary, post hoc response by the State can remedy the very practical but hopelessly intractable ambiguities that result from the decision to subject the right to freedom of speech and of the press to the undefined duty to obtain consent before speaking in public places and in public ways.[35]

C.R.S. § 18-9-122(3) forbids only such oral utterances as constitute "protest," "counseling," or "education." But what counts as "protest"?[36] As "education"? As "counseling"? The expression, "Down with Dr. Smith," for example, is presumably a protest. But what about "Pray for Dr. Smith" or "Please change your mind, Miss Jones"? Does the statement, "We can help you find a naturopathic treatment for your illness," count as "counseling"? Does a warning about the side effects or

35. At this juncture, the vagueness of C.R.S. § 18-9-122(3) cannot be cured by deferring to the Colorado courts. Having had the opportunity to clarify the statute, the Colorado Court of Appeals refused to do so. Pet. App. 44a. The Colorado Supreme Court declined to consider the vagueness issue. Pet. App. 46a.

36. Petitioners argued below that the term "protest" indicates that the *viewpoint* expressed will determine the lawfulness of the speech, because the usual meaning of that term includes only speech in opposition to something. The Colorado Court of Appeals held that "protest" in the statute includes all speech about a medical procedure, not only speech in opposition to something. Pet. App. 44a. While that construction, implausible as it is, cured the statute of *one* of the viewpoint-based defects its suffers, it also significantly expands the scope of an already overbroad statute.

aftermath of abortion constitute "education"? What about alerting the abortion-bound woman to the possible link between abortion and increased risk of breast cancer?[37] Does "May I help you?" or "Can I help you keep your baby?" count as "counseling"? No ready answers appear to these highly practical questions petitioners must face on pain of criminal liability. The meanings of "protest," "counseling," and "education" are "so vague that men of common intelligence must necessarily guess at [their] meaning[s] and differ as to [their] application[s]," *Connally*, 269 U.S. at 391; hence, a restriction based on such terms is unconstitutional. *Grayned*, 408 U.S. at 108-09. Petitioners are forced to proceed at their own peril – or to censor their speech out of fear of prosecution. The Constitution forbids such government-imposed guessing games. *Grayned*, 408 U.S. at 108-09.

And what of the statutory requirement of "consent[]"? The statute restricts protected expression within eight feet of another person unless that other person "consents." While it may be clear to the *listener* whether he or she consents to the speech, it is often far from clear to the *speaker*. Is the apparent acquiescence of the auditor or recipient sufficient? A nod or a shrug? An audible grunt or groan? An obvious pause in the listener's pace? If the sullen boyfriend of an abortion-bound woman tells one of the petitioners to shut up, does that command operate as a denial of consent for all covered expression? For such expression directly targeting the father of the soon-to-be aborted baby? The abortion-bound woman? If

37. *Cf.* Kindley, *The Fit Between the Elements for an Informed Consent Cause of Action and the Scientific Evidence Linking Induced Abortion with Increased Breast Cancer Risk*, 1998 WIS. L. REV. 1595; Loose, *Antiabortion Message Gets Free Ride on Metro System; Ads Linking Procedure, Breast Cancer Disputed*, Washington Post, Jan. 22, 1996, at A1.

a loitering youth flashes a rude hand gesture, will picketers be criminally liable for failing to hide their signs from public view as they walk past the youth?

Moreover, although the statute restricts "knowingly approaching" others, the statute does not indicate whether approaches are measured from the body or from the limbs or from personal property in the physical possession of the speaker, such as signs, leaflets, or pamphlets. Will the stretching outward of an arm constitute "approaching"? Will the tendency of an orator to rock forward on the balls of his feet as he speaks transform otherwise protected expression into a crime? The court below was satisfied to observe that persons seeking to exercise fundamental rights of expression could do so if they "stand still while inside the floating buffer zone," Pet. App. 21a. But this touches only the tip of the vagueness iceberg. The statute does not clarify in a constitutionally sufficient manner whether the motion of a hand, intentionally extended toward another person while the pamphleteer *stands* still, violates the statute.

"[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 149 (1959). This Court has reiterated this more stringent scrutiny of vague laws that impinge on first amendment rights. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) ("general test of vagueness applies with particular force in review of laws dealing with speech"). Stringent scrutiny, together with specificity in legislation, preclude the chill on free speech that results from vague laws:

> [t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions

> may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Button, 371 U.S. at 433 (citations omitted). C.R.S. § 18-9-122(3) fails to establish a definite standard of conduct; thus, it violates due process because "everyone is entitled to know what a statute requires or forbids." *Hynes*, 425 U.S. at 620.

C.R.S. § 18-9-122(3) is vague in yet another respect. The statute leaves enforcement too much to the unfettered discretion of private citizens deputized by Colorado to enforce the law: "laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ." *Grayned*, 408 U.S. at 108-09. Just as Cincinnati could not constitutionally regulate conduct "through the enactment and enforcement of an ordinance whose violation may entirely depend on whether or not a policeman is annoyed[,]" *Coates*, 402 U.S. at 614, Colorado is barred from elevating those personal predilections to a constitutional stature greater than the free speech right itself.

The statute provides no objective guidelines for permitting sign displays, leafletting, or the utterance of educational, counseling, or protest speech. Auditors may decide, from their own values, whether a person's constitutionally protected expression will be permitted. The right to free speech cannot depend on the good will or eccentricities of those enforcing the law. Such was the case in *Coates*, 412 U.S. at 615-16, where this Court noted that a statute that prohibits "annoying conduct" is an open and "obvious invitation to discriminatory enforcement." Subjective application of C.R.S. § 18-9-122(3) creates a real danger that citizens will be "chilled" in the

exercise of their rights of free speech, press and assembly. This is intolerable. Not only those who protest abortion will be silenced: "the free dissemination of ideas [will be] the loser." *Smith*, 361 U.S. at 149.

CONCLUSION

C.R.S. § 18-9-122(3) preconditions freedom of expression on the consent of passersby. It directly restricts constitutional rights. While purporting to serve an interest in securing access to health care facilities, it does not prohibit obstructive conduct at all. Instead, it suppresses freedom, without a close fit between expressive activities and the asserted interest in ensuring access to health care facilities.

The judgment below should be reversed.

Respectfully submitted,

THOMAS P. MONAGHAN
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
JOEL H. THORNTON
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 609
Washington, DC 20007
(202) 337-2273

Attorneys for Petitioners

November 12, 1999

DEC 10 1999

No. 98-1856

Supreme Court, U.S.
FILED
DEC 10 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, *et al.*,

Petitioners,

v.

THE STATE OF COLORADO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

BRIEF ON THE MERITS FOR RESPONDENTS KEN SALAZAR, STATE OF COLORADO, BILL OWENS, GOVERNOR AND CITY OF LAKEWOOD

KEN SALAZAR
Attorney General
MICHAEL E. MCLACHLAN
Solicitor General
FELICITY HANNAY
Deputy Attorney General
CAROL D. ANGEL*
Senior Assistant Attorney General
Attorneys for Respondents
Ken Salazar and State of Colorado,
Bill Owens, Governor
1525 Sherman Street, Fifth Floor
Denver, CO 80203
(303) 866-5016

ROGER W. NOONAN
MAUREEN HERR JURAN
GORSUCH KIRGIS LLP
Attorneys for Respondent
City of Lakewood
1515 Arapahoe Street
Suite 1000
Denver, CO 80202
(303) 376-5000

* *Counsel of Record*

156644

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

Section 18-9-122(3), C.R.S. (1999), prevents intimidation and potential obstruction of patients within 100 feet of any health care facility entrance. It prohibits only:

- knowingly approaching another person more closely than eight feet;
- without the consent of that person;
- for the purpose of demonstrating directed at that specific person.

The questions presented are:

1. Was the Colorado Supreme Court correct in holding the statute constitutional as a reasonable statutory regulation of the time, place or manner of expressive activity?

2. Is the statute an unconstitutional prior restraint?

3. Is the statute unconstitutionally vague or overbroad?

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STATEMENT OF THE CASE

In 1993, the Colorado General Assembly enacted § 18-9-122, C.R.S. (1999), to address the continuing problem of aggressive, sometimes violent demonstrations that obstructed safe access to health care. Prior to passing this law, the legislature considered testimony from a number of witnesses who had personally experienced obstructive and uncontrolled demonstrations outside health care facilities in Colorado, where crowds of demonstrators blocked access, J.A. at 93-95, 158-59,[1] and pushed, shoved, grabbed, kicked, punched, and bit patients and escorts. J.A. 94. One escort described being "hit by men twice my size while trying to get 12 and 13-year-old patients into the clinic, protecting them with my body." J.A. 105. The crush of demonstrators made it difficult to impossible to identify those responsible for the assaults and enforce existing laws. J.A. 94, 159, *see also* J.A. 224. The witnesses spoke of their fear for their physical safety, J.A. 93, in the midst of demonstrations they described as frightening, dangerous, threatening and intimidating. J.A. 94, 224.

The legislature also heard testimony about smaller groups of demonstrators, who nevertheless surrounded patients, escorts, and vehicles at close range, J.A. 70, 154, *see also* J.A. 218, 223-24, leaning into open car windows, J.A. 152, thrusting signs and leaflets into faces, J.A. 66, 70, 154, *see also* J.A. 229, and into windows of cars or onto windshields, J.A. 67, 99, 105-06. Again, the result was threats, *see* J.A. 224, fear for physical safety, *see* J.A. 218, 229, and physical intimidation, sometimes bringing patients to a standstill. J.A. 106, *see also* J.A. 222.

---

1. The legislative history in this case is corroborated by the sworn affidavits submitted in support of Colorado's Motion for Summary Judgment. *See, e.g.*, J.A. at 224. This case was decided on motions for summary judgment and the facts recited in the legislative history and the affidavits are uncontroverted. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (burden shifts to opponent after movant has established facts supporting summary judgment).

The legislature also heard of physical altercations between demonstrators and family members of patients, triggered by demonstrators' confrontational, in-your-face tactics. J.A. 100, 106, *see also* J.A. 225-26, 230.

In addition, the legislature was informed of several instances of disruptive and violent demonstrations on other issues outside medical facilities, and the disabled community's fear that:

> [A]s Operation Rescue and those types of organizations gain more publicity and higher profile, others begin to copy their tactics and techniques and that, of course, brings great concern to our community because people with disabilities tend to be targets. We are seen as vulnerable. We are seen as easy to push around. . . . Without bills like this, I think we're gonna see this kind of effort grow, increase and spread to other areas, and that's of great concern to me, and we certainly need to discourage that.

J.A. 155-57, *see also* J.A. 109.

The legislature was informed of ordinances passed by the Colorado communities of Denver and Boulder, which established eight-foot zones of separation between demonstrators and patients,[2] J.A. 60, 134, 147, 210, and of the federal district court ruling upholding the Boulder ordinance.[3] J.A. 116. Other witnesses described use of the ordinances to create a "zone of safety" for access to clinics, J.A. 70, *see also* J.A. 151, 154, 218-19, 221, 223, 225-26, 230, 281, including use by demonstrators to protect themselves. J.A. 106, *see also*

2. The text of these ordinances was attached to Defendants' Joint Motion for Summary Judgment as Appendix I, docketed March 7, 1994. R. Vol. II, at 278.

3. A transcript of the federal district court's bench ruling upholding the Boulder ordinance was attached as Appendix H to Defendants' Joint Motion for Summary Judgment, docketed March 7, 1994. R. Vol. II, at 263-76.

J.A. 226. The bill's sponsor stated that the effect of the ordinances, and the intended effect of the bill, was "everybody knows about it so they stay 8 feet away, and, therefore, there haven't been as many problems or confrontations." J.A. 127-28.[4] This mirrors the experience of Petitioners here, who have demonstrated under the Denver and Boulder ordinances, as well as Colorado's statute, while observing the place limitations, and have never been arrested or charged. J.A. 231-32, ¶¶ 1-9, 238-39, ¶ 12, 242-43, ¶¶ 1-9, 249, ¶¶ 11-12, 251-52, ¶¶ 1-9, 258, ¶ 11.[5] The legislature was also informed of buffer zones imposed elsewhere in the nation to preserve health care access. J.A. 61, 149, 213-14; *see, e.g., Bering v. SHARE*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987).

To address this well-documented threat to public health and the maintenance of law and order, the legislature enacted § 18-9-122. The statute takes a two-pronged approach designed to prevent abusive conduct while allowing **all** speech. In subsection (2), physical blockades were prohibited. In the challenged subsection (3), the legislature prohibited overly close approaches to unconsenting targets of the demonstrators: conduct which crowded and threatened vulnerable medical patients. J.A. 113-14, *see also* J.A. 224-25, 227, 229. The legislature discussed eliminating subsection (3) and relying solely on the prohibition of blockades, but determined that would provide insufficient protection, especially in the crowd situations

4. As of December 6, 1999, the Colorado State Judicial Administrator and the Colorado District Attorneys' Council computer systems verify that there have been no criminal charges or civil complaints filed under Colorado's statute in the more than six years since its passage, although demonstrations have continued, indicating that the statute, like the ordinances, has helped keep the peace as it was intended to do.

5. Petitioners state erroneously that Petitioner Simpson "discontinued his expressive activities," Pet. Br. at 4, but his responses to discovery indicated that he continued demonstrating outside the 100-foot zone around health care facility entrances. J.A. 258, ¶ 11.

that had been described. J.A. 117, 124-25. A revision to the harassment statute was also proposed as an alternative to subsection (3), but rejected as unclear, difficult to enforce, and possibly impermissibly content-based. J.A. 120-25.

Petitioners brought this challenge in Jefferson County District Court, seeking declaratory and injunctive relief. The district court evaluated the statute under the test set out by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Pet. App. 32a. First, the court determined that the statute was content-neutral, because "it does not govern the subject matter of the message." Pet. App. 33a. The court further determined that the statute was narrowly tailored to a significant governmental interest, protecting those seeking access to health care facilities from "being threatened, harassed or assaulted." Pet. App. 33a. Finally, the court found that the statute left open ample alternative means of communication, only making it "more difficult for Plaintiffs to force leaflets in the hands of unwilling recipients and their messages upon audiences unable to escape," but allowing all activities outside the place limitations in the statute. Pet. App. 34a. The district court also rejected Petitioners' overbreadth, vagueness, and prior restraint arguments, and dismissed the complaint. Pet. App. 34a-36a.

The Colorado Court of Appeals affirmed. Referencing this Court's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), the Court of Appeals found the statute content-neutral, applying equally to demonstrators on both sides of the issue and not depending on the "specific viewpoint" of any demonstrator. Pet. App. 42a. The court also found the statute narrowly tailored, leaving ample alternatives, observing that it "merely is directed at depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff." Pet. App. 43a. The court read Petitioners' overbreadth challenge as answered by its finding on narrow tailoring, Pet. App. 43a, and determined that the statute was neither vague nor a prior restraint. Pet. App. 44a-45a.

The Colorado Supreme Court denied certiorari. This Court granted certiorari, vacated the Court of Appeals' decision without opinion and remanded the case for reconsideration in light of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). Pet. App. 46a-48a. On remand, the Colorado Court of Appeals applied the *Ward* test, as expressly approved in *Madsen* and *Schenck*, Pet. App. 55a-56a. The Court of Appeals found that the statute differed from the invalid injunction in *Schenck*, Pet. App. 56a-57a, and ultimately determined that:

> [I]t is not unreasonable to require protesters to give way to a distance of eight feet so that one with physical disabilities has unimpeded access to a medical clinic especially when the protester can still vocally express his or her views on the issue at hand in a normal conversational voice.

Pet. App. 57a.

The Colorado Supreme Court affirmed. The issue before the Colorado Supreme Court was limited to whether the Court of Appeals erred in holding the statute constitutional upon reconsideration in light of *Schenck*. Pet. App. 59a. The Colorado Supreme Court first reviewed the legislative history that showed the interference with access to medical facilities, Pet. App. 5a-10a, and then evaluated the Colorado General Assembly's effort to accommodate both free speech rights and the right of access to medical care. Although the *Ward* test only requires a substantial governmental interest to sustain the statute, the Colorado Supreme Court found that the right of access to medical treatment was a fundamental right, relying on this Court's rulings that the right of privacy extends to medical decisions. Pet. App. 14a-16a.

The Colorado court then carefully reviewed this Court's decision in *Schenck*, Pet. App. 16a-19a, 27a-28a, and determined that this statute passed constitutional muster under *Schenck* for

two reasons. First, as expressly set forth in *Madsen*, this statute was to be evaluated under the somewhat less stringent *Ward* test. The Colorado Supreme Court understood Petitioners' counsel to have conceded that the *Ward* test was the appropriate test to be applied to evaluate the statute. Pet. App. 11a.[6]

Second, the statute was drawn more narrowly than the *Schenck* injunction, so that the court "[did] not believe that, even under the *Schenck* test, section 18-9-122(3) burdens more speech than is necessary." Pet. App. 28a. Accordingly, the court held the statute "a valid time, place and manner restriction, a permissible legislative response designed to assure safety and order for citizens entering and leaving Colorado health care facilities." Pet. App. 29a.

SUMMARY OF ARGUMENT

Colorado's statute regulates only conduct by demonstrators shown to impede safe access to health care, endanger public safety, and hinder effective law enforcement. On public ways or sidewalks within 100 feet of any health care facility entrance, it prohibits only: (1) "knowingly approaching" another person more closely than eight feet; (2) without the consent of that person; (3) for the purpose of demonstrating directed at that specific person. The consent provision leaves demonstrators' First Amendment rights to reach the minds of willing listeners completely unrestricted. Unwilling targets of demonstrators will still be exposed to the full range of demonstrators' messages, whether expressed through a normal conversational tone, shouting, bullhorns, signs, or waving leaflets; the small zone of

6. In evaluating the content-neutrality of the statute under the *Ward* test, the Colorado Supreme Court also noted that Petitioners had not contended that the statute was content-based in this appeal. Pet. App. 21a. Petitioners now dispute this interpretation, *see* Reply to Brief in Opposition at 4-6, but their quote from the oral argument before the Colorado Supreme Court does not appear to support their argument. *Id.* at 2a. The Colorado Supreme Court's decision is correct whether or not Petitioners waived these arguments.

separation merely insulates medical patients, family and staff from the most physically threatening, obstructive, and harassing component of demonstrators' conduct.

Because the statute represents the Colorado General Assembly's policy choice on the most effective means of accomplishing key police power goals of public health and safety, it must be evaluated under this Court's well-settled reasonable time, place, and manner test. It must be content-neutral; be narrowly tailored to serve a substantial governmental interest (although not necessarily the least restrictive alternative); and leave open ample alternative channels of communication. The statute more than satisfies this test.

The statute's language, legislative history, and interpretation by the Colorado Supreme Court all demonstrate that it is content-neutral, applying to all demonstrations on any topic or espousing any viewpoint. The statute's focus is on the intrusive conduct of a demonstrator's unconsented approach, not on the demonstrator's message. The requirement of consent for an approach incorporates a well-recognized legal concept used to regulate physical interactions, from trespass to sexual assault, giving medical patients control over demonstrators' close approaches, but not their messages. Unlike the heckler's veto, it does not allow a hostile mob to drive an unpopular speaker from the streets; instead, it provides a patient a few arms' lengths of space between her and a hostile mob of demonstrators.

The statute is narrowly tailored to serve substantial governmental interests in health, safety, law enforcement, and traffic flow. The statute is actually the least restrictive alternative to serve a compelling governmental interest, considering the state's compelling interest in preserving safe access to health care, the more restrictive alternatives rejected in favor of this statute, and the lack of any narrower alternatives that would prevent crowding and physical threats to patients.

The statute leaves open ample alternative channels of communication. The only avenue of communication restricted is nose-to-nose harangues of an unwilling listener. As the Colorado Supreme Court found, everyone in the vicinity of health care facilities is "still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature"; they just cannot approach an unconsenting individual within eight feet. Pet. App. 27a.

The statute is neither overbroad, a prior restraint, nor vague. It does not prevent the expression of any message either to the public at large or to individually targeted patients, but prevents only the physical intimidation of patients by demonstrators who approach too closely. It sets clear standards of distance, using commonly understood concepts.

Petitioners' and *amici's* arguments against the statute either misrepresent the operation of the statute or advocate a new First Amendment right consistently rejected by this Court: the coercive right to pursue, surround, crowd, abuse and physically threaten medical patients until they accept demonstrators' unwanted messages. This Court should reject such a distortion of free speech and uphold the constitutionality of Colorado's statute.

ARGUMENT

I.

THE STATUTE OPERATES WITH PRECISION TO PROTECT ACCESS TO HEALTH CARE, PUBLIC SAFETY, AND PEDESTRIAN AND TRAFFIC MOVEMENT WHILE BURDENING AS LITTLE EXPRESSIVE ACTIVITY AS POSSIBLE.

Petitioners and their supporting *amici* persistently misrepresent the statute, likening it to numerous invalid flat bans on expressive activity, *see, e.g.*, Pet. Br. at 19,[7] or misstating its approach provision. Pet. Br. at i, 29, 35, 37; AFL-CIO Br. at 13 n.6; PETA Br. at 9; Liberty Counsel Br. at 7, 12, 15. In reality, the Colorado General Assembly took great care not to ban **any** expressive activity, but to set understandable ground rules for such activities immediately outside hospitals, clinics, and doctors' offices. No communication, regardless of how unwelcome, is prevented, only its overly close proximity. The statute does not censor speech, drive any message from a public forum, or create a heckler's veto. It creates a small zone of safety — about three steps — around individuals outside medical clinics to allow unimpeded movement; to prevent crowding, physical intimidation, and threats; to allow visibility and space for police to be able to enforce the law; and to allow room for those who are following this Court's instructions to simply turn away from unwanted messages to do so. Each provision of § 18-9-122(3) is necessary to accomplish the protection of core governmental interests in public safety and health.

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7. *See also* Pet. Br. at 20, 21, 23, 25, 27, 33 n.25, 34, 37, 39, 40 n.32, 44; AFL-CIO Br. at 12 n.5; PETA Br. at 15, 17; Liberty Counsel Br. at 3, 19, 21; *but see* ACLU Br. at 20.

A. The statute applies only *within 100 feet of health care facility entrances*. This place limitation is directly tied to the legislature's fundamental purpose of protecting health, which is at the core of the state's police power. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). The statute applies on public ways and sidewalks immediately outside health care facilities such as hospitals, where this Court has recognized a heightened need for tranquillity. *See NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-85 (1979); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (courts, libraries, schools, and hospitals "require peace and quiet to carry out their functions"). This access area is also where the targets of the demonstrations are most likely to be physically impaired and thus more vulnerable to both intimidation and obstructive crowding. *Cf. ISKCON v. Lee*, 505 U.S. 672, 684 (1992) (noting the risk of duress from a solicitor targeting "the most vulnerable, including . . . those suffering physical impairment and who cannot easily avoid the solicitation."). Such targets are also less likely to be able to simply turn away from an unwelcome message when it is thrust upon them at close quarters.

The legislature's concern extended not only to the permanently disabled, who may need extensive health care, *see* J.A. 155-56, but to those facing medical procedures such as surgery, which is best performed on a patient not subjected to the stressful conduct of crowding and physical intimidation. *See* J.A. 108, 220-21, 273-75. Ultimately, the legislature acted to preserve the right of all Coloradans to choose "health services which could save their lives, such as cancer screening and treatment, routine medical examinations and pap smears." J.A. 59; *see also* J.A. 113 ("the right of any patient to seek the medical treatment they need.").[8] Thus the statute is limited to

8. Even at reproductive health care clinics, 93% of the patients seeking access were there for health care other than abortions. J.A. 62, 150.

the 100-foot zone immediately outside health care facility entrances, but is not limited to any particular type of health care facility.[9] The 100-foot zone closely corresponds to the area where patients can no longer cross the street or detour around demonstrations, but must run a gauntlet to get into clinics and hospitals. This unique and important concern with safe access to medical care applies outside all health care facilities, as distinguished from commercial businesses or government offices.

The statute applies to all persons within this medical entrance zone because it is the most effective, least intrusive means to accomplish the legislature's public safety and health purposes. The legislature was concerned with those seeking access, whether patients, family, or staff. J.A. 61, 147-48; *see also* § 18-9-122(1), C.R.S. (1999). Persons within this zone are the most likely to be seeking access to the medical facility. Those who have no need to access medical facilities are likely to cross the street to avoid a demonstration. Within this medical entrance zone, the need to regulate crowding and physically intimidating conduct took priority over distinguishing between those seeking access and the occasional passerby. Requiring targeted patients to publicly identify themselves to claim the statute's protection would invade their privacy and increase their vulnerability. Placing the burden on demonstrators to distinguish between those seeking access and passersby would make the statute less clear and compliance more difficult.

9. "Health care facility" is defined as "any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state." § 18-9-122(4), C.R.S. (1999). The offices of dentists, chiropractors, or optometrists are not covered, contrary to amici's assertion. Life LDF Br. at 13. *See* § 12-36-106, C.R.S. (1999) (defining the practice of medicine). The legislature was clearly talking about **physical locations** with "entrance doors," so that "entity" does not refer to individual doctors. Life LDF Br. at 14.

B. The statute applies only *within eight feet of another person* within the 100-foot entrance zone. "[Eight] feet is a reasonable distance, it's roughly two arms' length away, and in conversation with strangers in public areas, it's just about the distance that you'd be comfortable standing at." J.A. 151. The Boulder and Denver ordinances which served as partial models for this law also used this distance, and the federal district court upheld the Boulder ordinance, relying on the finding of social scientists that this is the normal distance for initiation of conversations between strangers in public. R. Vol. II, at 263-276; *see also* J.A. 227-29, 273. The legislature relied on empirical knowledge as well as social science. As the federal district court evaluating the Boulder ordinance observed, "[Y]ou know, that's rather obvious and that's rather true. When someone comes too close, you back up and you do feel threatened." R. Vol. II, at 268. The legislative debate is rife with the need to prevent physical intimidation, J.A. 59, 95, 114, 151, 181, and the repeated references to "in-your-face" demonstrating and "get out of my face" are colloquial shorthand for the same simple concept — that overly close approaches are obstructive and threatening. One legislator noted that the effect of the statute was simply to define the unconsented-to approach within eight feet as a threat, rather than leaving the definition of a threat up to the judgment of police. J.A. 164. The distance makes things more clear for law enforcement and protesters alike, especially in crowd situations, J.A. 117, 122, 124-25, and also serves to defuse confrontations that could lead to violence. J.A. 138 ("Kindergarten teachers pull kids apart when they begin to have fights."); *see also* J.A. 224, 225, 230.

Finally, the legislature carefully determined that the eight-foot distance would serve all of the above purposes **without preventing the expression of demonstrators' messages to their intended audiences**. J.A. 78, 82, 107, 137, 149, 202, 206, 211. Even an opponent of the bill argued that someone could "measure themselves eight-feet and one inch, and say any foolish

or wrong thing they want to someone, it's not going to change that." J.A. 80. The bill's sponsor stated that the purpose of the eight-foot limitation was to:

> protect the patient's right to be free from the kind of spitting, the kind of intense intimidation and physical threat that they are now [experiencing], while at the same time protecting the rights of people who are trying to counsel them and talk to them. Eight feet is far enough so that you can't get up into someone's face and stop them from moving. However, eight feet is also close enough so if you say to someone, "Would you like to take a pamphlet?" or you say to them "You're killing your baby. I'd like to talk to you about that," that person can clearly hear and see what you're saying and, if they're interested in receiving your information, can consent. . . .

J.A. 114. The eight-foot distance was chosen to insure no interference with communication, yet prevent crowding and physical threats.

C. The statute applies only *to knowingly approaching another person for the purpose of demonstrating directed at that specific person*. This provision precisely regulates the intimidating conduct of targeting patients with inescapable messages and crowding. The requirement that the approach must be done "knowingly" insures that inadvertent conduct will not be punished. "Approach" regulates only the physical movement of the demonstrator toward his target, responding to the descriptions of patients subject to intrusive approaches. *See* J.A. 59 ("come inches away from people's faces"), 70 ("surrounded"), 106 ("pamphlets were shoved into her car against her will"). The legislature was clear that the bill did not regulate standing still. J.A. 76-78. Demonstrators who either stand still or stay a few steps away raise lesser risks of physical intimidation or interference with access than those who closely pursue and surround their targets.

By regulating approaches made for demonstration purposes, this provision narrowly addresses the conduct shown to interfere with access through crowding and physical threats. A person walking past on the street, with no eye contact or attempt to communicate, is an everyday occurrence which triggers little sense of threat or risk of obstruction. The social science findings on the threatening effect of overly close approaches apply to approaches for some kind of interaction or communication. J.A. 227-28, ¶¶ 6-8, 286-88, ¶¶ 10-12. The access problems the bill was designed to correct were all the result of approaches made by demonstrators.

By regulating only "approaches," the statute requires an affirmative action by the demonstrator to violate the statute, and the demonstrator does not have to back away from an oncoming listener. Further, because the demonstrator controls both the approach and the purpose, punishing inadvertent approaches is avoided.

D. The statute applies only to knowing approaches of another person *without the consent of that other person*. The legislature included the consent provision specifically to make sure the statute burdened as little speech as possible, allowing anyone who wishes to accept a leaflet, closely study a sign, or engage in a close personal conversation to do so. J.A. 118, 148, 211; *see also* J.A. 82, 114-15, 123.[10] Targeted patients, staff and family who wish only to gain access to clinics without engaging in argument or accepting a leaflet may do so without having to dodge or run. All people, whether they grant or withhold consent, are protected from threatening and physically intimidating conduct, because it is unexpected, undesired approaches which produce such reactions; and being in control of the proximity of the approach decreases the threat and sense of invasion. J.A. 285-89; *see also* J.A. 227-29. This provision also eliminates any possibility of a bystander or

10. Consent was to be interpreted broadly to include non-verbal consent. J.A. 61, 82, 115, 185.

companion controlling the demonstrator's approach, because it is the consent of the person the demonstrator seeks to communicate with that controls.

The requirement of consent up front rather than a "back off" provision adds clarity, and actually makes it easier to comply with the statute. *See* J.A. 118. It also provides protection before an approach becomes a threat, rather than after the harm has already occurred, especially for a silent target too intimidated to say "back off." *See* J.A. 98.

Each provision of the statute was chosen to precisely address crowding and physical intimidation: conduct shown to impede access, endanger safety and health, and strangle effective law enforcement.

II.

THE COLORADO SUPREME COURT CORRECTLY DETERMINED THAT THE STATUTE IS CONSTITUTIONAL, APPLYING THIS COURT'S LONG-SETTLED "REASONABLE TIME, PLACE, OR MANNER" STANDARD.

A. Legislatures should be allowed policy choices among reasonable alternative approaches when regulating the time, place, or manner of expressive activities to serve other important societal interests. As this Court noted in adopting a more stringent standard of review for court-imposed injunctions, statutes and ordinances "represent a legislative choice regarding the promotion of particular societal interests." *Madsen*, 512 U.S. at 764. Because they apply generally rather than to an individual or small group before the court, statutes create lesser risks of censorship or discrimination. *Id.*

Legislatures are often faced with a number of arguably effective means of accomplishing their policy goals, and are uniquely suited to choose, after public debate and submissions

from affected parties, among those means for the most effective implementation of their policy choices. *See Turner Broadcasting System v. FCC*, 520 U.S. 180, 199 (1997) (describing nature of legislative process). The same facts may support different conclusions in the judgment of different decisionmakers. This Court, therefore, has guarded against a judge substituting his policy choice for a legislature's, consistently holding that the validity of time, place or manner regulations "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Turner Broadcasting System*, 520 U.S. at 218, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). Otherwise, courts would have to sift through all imaginable means to determine whether the chosen legislative scheme was the precisely least intrusive means of achieving its desired end, an approach this Court has consistently refused to require. *Turner Broadcasting System*, 520 U.S. at 217-18.

Accordingly, the Colorado General Assembly's determination of the means most suited to accomplish its health and safety purposes, unlike a single judge's injunction, must be reviewed simply to determine whether the means chosen are "substantially broader than necessary" to accomplish the governmental interests. *Turner Broadcasting System*, 520 U.S. at 218, quoting *Ward*, 491 U.S. at 800. The legislature's chosen method "need not be the least restrictive or the least intrusive means." *Ward*, 491 U.S. at 798.

B. The Colorado courts carefully followed this Court's precedents and properly evaluated the statute under the *Ward* test. The Colorado Supreme Court applied this Court's holding that:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they

> are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). *See also Turner Broadcasting System*, 520 U.S. at 215-16; *Madsen*, 512 U.S. at 764; *Ward v. Rock Against Racism*, 491 U.S. at 791; *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). This Court has determined that the above "standard time, place, and manner analysis is not sufficiently rigorous" for the evaluation of speech-regulating injunctions. *Schenck*, 519 U.S. at 371, quoting *Madsen*, 512 U.S. at 765.

Petitioners and their supporting *amici*, however, attempt to contrast Colorado's statute unfavorably with the injunctions evaluated in *Schenck* and *Madsen*, arguing the statute is overbroad because its application is not limited to "persons with a history of bad conduct." Pet. Br. at 23.[11] Such arguments amount to nothing more than thinly disguised attempts[12] to reargue the question of the appropriate distinctions between statutes and injunctions which this Court has already addressed twice in the past few years. Further, they profoundly distort the role of a legislature.

A legislature passing a new law to address a broad social problem cannot limit its application to those who are already lawbreakers or who have already behaved inappropriately. Such an approach would create problems of retroactive application, probably invalidating the law. *See* U.S. Const., Art. I, § 9(3).

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11. *See also* Pet. Br. at 14, 25, 26 n.18, 27, 41 n.34; ACLU Br. at 12, 22; AFL-CIO Br. at 2, 20-21; PETA Br. at 17, 23-24; Liberty Counsel Br. at 2, 5-6.

12. Or undisguised attempts — one *amicus* expressly questions the *Schenck* and *Madsen* distinction between injunctions and statutes. ACLU Br. at 8, 17-18.

It would also fail to address the problem: the legislature acted here because existing laws had not controlled the problem, or were unenforceable in the crowded, confrontational demonstrations described. J.A. 94, 105, 117, 121-22, 124-25, 159, 208.

The role of a legislature is not to punish after the fact, but, through the laws it enacts, to set standards as to what is expected of everyone in the future. Laws are enacted to deter harmful conduct by those who have not already indulged in it, as well as those who have. Legislatures may act to prevent harms from reasonably anticipated results, rather than picking up the pieces after problems rise to their most acute level. *See Turner Broadcasting System*, 520 U.S. at 212. They may consider the harm inflicted on society from the tactics employed by one group and act to prevent the greater harm that would follow if a number of groups adopted the same tactics, *Clark*, 468 U.S. at 296, as the legislature did here. J.A. 109, 113, 155, 157, 210. This law is no less valid because the legislature did not wait until every possible group with a grievance laid siege to every health care facility in Colorado with the same threatening and obstructive tactics.

C. The statute is content-neutral. The statute satisfies the first prong of the *Ward* test, in that it is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791, quoting *Clark*, 468 U.S. at 293. The statute is clearly aimed at the crowding and threatening conduct of an overly close approach, and does not prevent communication, no matter what the message. The legislature discussed the fact that the statute would also regulate pro-choice, animal rights, or anti-Medicaid demonstrators.[13] J.A. 113, 139, 208; *see also* J.A. 106 (use of Denver ordinance by anti-abortion protesters to protect themselves). Opponents of the bill criticized it for applying to

13. Indeed, the *amicus* briefs supporting Petitioners from People for the Ethical Treatment of Animals and the AFL-CIO demonstrate this point.

such things as circulating voter initiative petitions, J.A. 215, labor picketing, J.A. 145, or political campaigning, J.A. 191.[14] The bill's sponsor argued against an amendment focusing on strengthening the harassment laws because it might be content-based and thus have constitutional problems. J.A. 121.

The legislature recognized that it could not regulate speech for offensive content. Although some of the testimony and legislative debate discussed the extremely offensive terms (*e.g.*, "murderer" and "baby-killing bitch") used by some demonstrators outside clinics, J.A. 69-71, 98-99, 134-36, 152-54, the focus was on the heightened threat of any message delivered at extremely close range. *Id.*; *see, e.g.*, J.A. 99 ("whether you're one foot away or eight feet away, the words have the same impact, the same meaning and they can be just as abusive, but at least they are not in the people's faces."). The legislature enacted a statute that both proponents and opponents agreed did not attempt to regulate "nastiness [or] zealous obscene verbal abuse," J.A. 183, or "foolish," "wrong" or "inappropriate" things, J.A. 80, but only the proximity of any message. The sponsor stated the intent and operation of the bill during the floor debate:

> We're not telling people what they can say. They can say anything that, that they want. And we're not preventing them from talking to anyone. In fact, they can do it from 8 feet away.

J.A. 137; *see also* J.A. 138 ("I don't care what side you're on. If you're pro or con, stay back 8 feet. And that gives everybody their right to speak their piece.").

Both by its plain terms and its legislative history, the statute does not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner*

14. Petitioners' own examples of the statute's application show its content-neutrality. Pet. Br. at 9.

Broadcasting System, Inc. v. FCC, 512 U.S. 622, 643 (1994). It makes no attempt to single out any topics of speech, such as labor, political, or religious speech. Thus, it is not content-based, such as the statutes evaluated in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (exempting labor picketing); *Carey v. Brown*, 447 U.S. at 461 (same); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (burdening only political speech); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (same); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993) (burdening only religious speech). The statute applies to speech on any topic.

Neither does the statute single out any speech based on the viewpoint of the speaker, unlike the provision invalidated in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (striking down "bias-motivated crime" ordinance that expressly applied to only one side of a debate). The legislative history shows that the statute was drafted and intended to apply to all sides and all topics of debate outside health care facilities.

Petitioners and *amici* argue that the statute's application to approaches for "oral protest, education, or counseling"[15] is content-based, although they admit it applies neutrally to all signs and leaflets. Pet. Br. at 31-32. The Colorado Supreme Court apparently understood that Petitioners had waived any argument on this issue. Pet. App. 21a. Regardless of any waiver, the Colorado Supreme Court correctly determined that the statute is content-neutral, because, "The restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."[16] Pet. App. 22a.

15. These terms were apparently taken verbatim from the Boulder and Denver ordinances. *See* R. Vol. II, at 278.

16. Petitioners and *amici* misleadingly quote from the original, **vacated** decision of the Colorado Court of Appeals rather than the (Cont'd)

The Colorado Supreme Court's ruling confirms that the statutory language should be interpreted to refer to approaches for all communication, as Colorado has argued since the beginning of this case. J.A. 293-94.[17] Consistent with the legislative history and the obligation of the courts to interpret statutes to be constitutional if possible, "protest" is used to mean any statement of any viewpoint, and is not limited to negative statements. "Counseling" includes any attempt at debate, and "education" any attempt to offer information. These cover all inquiries as well. This interpretation is consistent with the legislative history, which shows that the legislature was concerned with the proximity of demonstrators, not the content of their messages. J.A. 113, 137-39, 145, 191, 208, 215.[18]

Petitioners apparently are concerned that the statute might be interpreted to exempt simple greetings and social conventions unlikely to raise feelings of threat, such as "Good morning," or "Do you have the time?" As noted, this appears contrary to the Colorado Supreme Court's interpretation. In any case, the only distinction this interpretation raises is between speech expressing some content and innocuous social phrases. This Court has not struck down any regulation on the basis of such a

(Cont'd)
decision under review here, or even the second Court of Appeals decision that was affirmed by the Colorado Supreme Court. Pet. Br. at 46 n.36, Life LDF Br. at 10-11.

17. Contrary to Petitioners' argument, Pet. Br. at 32 n.24, this interpretation does not make the statute overbroad; rather, it is an extremely limited, narrowly tailored place regulation, as set forth in Section II.D below. Petitioners' arguments on the oral communication prong of the statute set up an insupportable constitutional Catch-22, in which the statute is either invalid as content-based because it does not apply to all communication, or invalid as overbroad if it does.

18. One legislator may have advanced the idea that the statute did not cover commercial speech, but then seems to have dropped it. J.A. 175.

distinction, and should not do so now. Both *Schenck* and *Madsen* upheld injunctions that restricted "demonstrating," 519 U.S. at 366-67; 512 U.S. at 768, which also could be interpreted to exclude social conversations.

This Court should interpret the statute consistently with the Colorado Supreme Court's implicit conclusion that the statute applies to all communication, in order to eliminate any possible constitutional question. *See Frisby*, 487 U.S. at 482-83 (adopting narrowing construction of residential picketing ordinance); *United States v. Grace*, 461 U.S. 171, 176 (1983) (interpreting prohibition on "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" to apply to almost any sign or leaflet carrying a communication to avoid constitutional problems; law struck down on other grounds). Such an interpretation eliminates all possible confusion that Petitioners or supporting *amici* are able to imagine, and is consistent with the legislature's intent to regulate all targeted, overly close approaches regardless of content.

The consent provision of the statute does not affect its content-neutrality. Like the "cease and desist" provision within the fixed buffer zone that this Court upheld in *Schenck*, 519 U.S. at 381 n.11, the record is clear that the legislature included the consent provision in order to burden as little speech as possible, and to preserve anyone's right to have a face-to-face discussion or take a leaflet **if both parties desire such an interaction**. J.A. 148 (consent provision a "safeguard"), 211 (consent "the most important part" of the provision); *see also* J.A. 82, 87, 114-15, 118, 137, 185, 214. Like the *Schenck* cease-and-desist provision the consent provision should be assessed in light of the fact that it was included to enhance speech rights, and upheld. 519 U.S. at 383-84. Again like the *Schenck* cease-and-desist provision, it should not be regarded as content-based, because demonstrators remain free to espouse their message outside the eight-foot limit, and the restriction

on approaches within eight feet is a response to previous harassment and intimidation. 519 U.S. at 385.

The approach taken by the Colorado legislature is similar to that approved by this Court in *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 737 (1970), recognizing that different individuals might find different mailings offensive, and thus upholding a statute which allowed an individual the absolute discretion to invoke the power of the Post Office to prohibit delivery of mail which the individual found offensive. *See also Breard v. City of Alexandria*, 341 U.S. 622, 643 (1951) (restriction on unwanted commercial solicitation upheld, distinguishing *Martin v. City of Struthers*, 319 U.S. 141 (1943)). Consent is a well-recognized concept used to regulate close physical interactions, from trespass to sexual assault. Here it allows the individual accessing a medical clinic to control only whether a demonstrator's message may be expressed in that individual's face or from a few steps away.

The statute is justified in part by patients' sense of intimidation and threat from the **manner and proximity** of in-your-face approaches. This satisfies the *Ward* standard of "justified without reference to the content of the regulated speech," 491 U.S. at 791, because the statute is not justified by audience reaction to the **content** of speech. This Court has approved a number of time, place, or manner regulations because of the annoying or troublesome nature of speakers' conduct in inappropriate locations, including intrusively amplified speech in residential areas, *Kovacs v. Cooper*, 336 U.S. 77 (1949); targeted picketing of individual residences, *Frisby*, 487 U.S. at 477; noisy demonstrations near schools, *Grayned v. City of Rockford*, 408 U.S. 104 (1972); demonstrations that interfere with the proper operation of jails, *Adderley v. Florida*, 385 U.S. 39 (1966), or courthouses. *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cameron v. Johnson*, 390 U.S. 611 (1968).

Here, the legislature heard descriptions of demonstrations that were highly offensive in both their content and in their location — inches away from patients seeking to turn away from the demonstrators and safely enter medical facilities. The legislature appropriately acted to control the threatening, overly close personal proximity of the expressive activity but not its content. The consent provision does not change this, but instead makes the statute more narrowly focused, because it is **unwanted** nose-to-nose communications that trigger the sense of physical invasion, while agreed-upon face-to-face conversations do not. J.A. 227-29, ¶¶ 6-8, 286-88, ¶¶ 10, 13.

This narrow restriction on close personal proximity does not create a "heckler's veto," like the one held to be improperly content-based in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Colorado has not empowered a hostile mob to drive unpopular speakers from an entire forum, such as the streets of a county, *id.*, or village. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). Rather, within a narrowly circumscribed area near health care facilities, it has empowered vulnerable patients, family, and staff to keep unwanted, intimidating, physically threatening demonstrators at arms' length. Demonstrators' messages will still be clearly visible and audible to their intended audience and the public at large, *see* J.A. 107, 219, 223, 225, 230, unlike the broad provisions in *Forsyth County* and *Skokie*. Demonstrators are free to express their messages in their chosen forum immediately outside medical clinics by simply standing still or refraining from rushing patients. Like the District Court's inclusion of the cease-and-desist provision within the *Schenck* fixed buffer zone, the legislature's "extra effort to enhance [demonstrators'] speech rights" by allowing consented approaches as an exception to the eight-foot zone of separation should not redound to Colorado's detriment. 519 U.S. at 381 n.11.

D. The statute is narrowly tailored to serve substantial and compelling governmental interests. The statute is expressly designed to safeguard access to medical care. § 18-9-122(1), C.R.S. (1999). The legislative debate also reveals other goals: protecting public safety and order, assuring freedom of movement on sidewalks and streets, preventing violent confrontations, and improving enforcement of existing laws against assault.[19] J.A. 114, 117, 122, 124-25, 138, 149, 212. This Court has already recognized these interests as substantial. *Schenck*, 519 U.S. at 376; *Madsen*, 512 U.S. at 767-68. Public health, welfare and safety are core government goals. *See Metropolitan Life Ins. Co.*, 471 U.S. at 756 (health); *Nollan et ux. v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (safety); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals").

The Colorado Supreme Court recognized preservation of access to medical care as a compelling interest, relying on this Court's articulation of the constitutional right to privacy, including the right to control certain medical decisions. Pet. App. 13a-16a; *see also* J.A. 124. Contrary to Petitioners' arguments, *see* Pet. Br. at 35, the Colorado Supreme Court did not base its ruling on the right to be let alone on public sidewalks, but on the right to safe access to medical services as a component of the overall right of privacy. The court recognized, as one *amicus* has admitted, that such rights "quickly become meaningless if they cannot be exercised without running a gauntlet of violence, intimidation, and harassment." ACLU Br. at 1.

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19. Petitioners, instead of addressing the government interests shown on the face of the statute and in the legislative history, have chosen to invent "straw interests" to knock down, Pet. Br. at 35-36 (protection from "offensive or controversial" speech, right to be left alone on public sidewalks), or to claim that no "valid," "conceivable," or "legitimate" government interest underlies the statute. Pet. Br. at 19, 34, 35, 37.

Burson v. Freeman, 504 U.S. 191, is instructive here. This Court upheld an explicitly content-discriminatory statute that banned **all** political speech within 100 feet of polling places, because of the state's compelling interest in protecting voters from intimidation and interference. *Id.* at 199. Relying on a history of abuses outside polling places, *id.* at 200-06, this Court determined that laws prohibiting interference with elections or intimidation of voters fell short by dealing with only the most blatant and specific attempts to impede elections. *Id.* at 206-07. Noting that it takes approximately 15 seconds to walk 75 feet, this Court said:

> The State . . . has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice.

Id. at 210.

Colorado has an equally compelling interest in protecting the right of safe access to potentially life-saving medical treatments such as pap smears, J.A. 62, 136, 195, cancer treatment, J.A. 59, 105-06, 217-18, surgery, J.A. 156, and organ transplants, J.A. 107, from intimidating and disorderly conduct. *See Bering v. SHARE*, 721 P.2d at 929. The Colorado General Assembly's decision to make the last two seconds before a demonstrator can make physical contact with a patient free from interference is not an unconstitutional choice.

The statute is narrowly tailored to serve these substantial and compelling interests. Within 100 feet of health care entrance doors, it regulates only a demonstrator's unconsented, targeted approach within eight feet, so close that it is virtually indistinguishable from a physical threat. J.A. 227, 229, 273-83, *see also* J.A. 114, 218, 220-21, 223, 224. The statute simply gives patients, family and staff a small space in which to keep moving, and to be out of the reach of a swinging fist or foot, or a sign wielded as a weapon.

Subsection (3) is not duplicative of subsection (2)'s prohibition on blocking access. Under the more rigorous test for injunctions, this Court upheld 36-foot and 15-foot fixed buffer zones in *Madsen* and *Schenck* that prohibited all or almost all expressive activity within them, in spite of separate provisions in the injunctions that prohibited blockades. *Madsen*, 512 U.S. at 759, 769-70; *Schenck*, 519 U.S. at 381-82. Without the "prophylactic measure" of the fixed buffer zone approved in *Schenck*, it was reasonable to conclude that demonstrators would, as they had in the past, continue to crowd patients and interfere with access. 519 U.S. at 381-82. Without the similar prophylactic measure of the eight-foot zone of separation in the statute, the legislature reasonably feared that demonstrators would continue to crowd and surround patients at such close quarters that intimidation was inevitable, access difficult, and enforcement of existing harassment and assault laws hampered.

The statute does not share the problems of the no-approach or moving zones struck down under the stricter test of *Schenck* and *Madsen*. First, it applies only within eight feet, a normal conversational distance with strangers, rather than the 15-foot distance in *Schenck*. Unlike the immense "no-approach" zone in *Madsen*, where it was not clear how near or far a demonstrator could be before he was prohibited from approaching, the statute does not restrict "all uninvited approaches . . . , no matter how peaceful." 512 U.S. at 774. Rather, it applies only within eight feet of a targeted person, where the conduct of an uninvited approach is not peaceful, but threatening. The statute prevents no communication, because speech, signs and handbills can be perceived at eight feet, whether or not the target consents. Of note, this Court refused to strike down the cease-and-desist provision within the fixed buffer zone in *Schenck* on the basis of *Madsen's* invalidation of the consent-based no-approach zone, noting that *Madsen* was "easily distinguishable" because of the breadth of the 300-foot zone. 519 U.S. at 384 n.12.

Second, the statute applies only to a knowing approach, so there is no possibility of an inadvertent violation, and the demonstrator may stand still and is not forced to retreat from advancing patients or staff. *See* Pet. App. 21a, 24a-25a; *see also* ACLU Br. at 6, 15 n.9 (admitting differences from injunction that "ameliorate" statute's application). Thus, unlike the injunction in *Schenck*, the statute does not restrict "those who simply line the sidewalk or curb in an effort to chant, shout, or hold signs peacefully." 519 U.S. at 380. Finally, it applies only between the demonstrator and the individual the demonstrator is trying to talk to, and not to bystanders or others who might approach the demonstrator from behind or from several directions. Thus, unlike the injunction in *Schenck*, the movement of a third party cannot cause a demonstrator to violate the statute, Pet. App. 28a, so that "attempts to stand 15 feet [or eight feet, under this statute] from someone entering or leaving a clinic and to communicate a message" are not made hazardous, but are fully protected. 519 U.S. at 378.

Finally, Colorado has relied only on subsection (2)'s prohibition on blocking access and subsection (3)'s eight-foot zone of separation to accomplish the same purposes as the multi-part injunctions in *Schenck* and *Madsen*. Those injunctions prohibited: (1) demonstrating within both fixed buffer zones (of 15 feet and 36 feet, respectively) **and** moving zones of separation; (2) blocking access; and (3) "physically abusing, grabbing, touching, pushing, shoving, or **crowding**," *Schenck*, 519 U.S. at 366 n.3 (emphasis added); or "physically abusing, grabbing, **intimidating**, **harassing**, touching, pushing, shoving, **crowding** or assaulting" persons accessing the clinics. *Madsen*, 512 U.S. at 760 (emphasis added). The statute's narrow place limitation prevents exactly the crowding, intimidation, and harassment prevented by the *Schenck* and *Madsen* injunctions, in a way that sets more precise standards for demonstrators, patients, and law enforcement.

Contrary to the arguments of Petitioners and supporting *amici*, the statute does not lack narrow tailoring merely because it applies to all demonstrations outside all health care facilities and addresses prospective misbehavior rather than past offenses. *See, e.g.*, Pet. Br. at 23, AFL-CIO Br. at 6, 11 n.4. Rather, these are the proper characteristics of a non-discriminatory, non-retroactive statute of general application. *See Madsen*, 512 U.S. at 764. As the Colorado Supreme Court found, these very characteristics make the statute comprehensive and content-neutral. Pet. App. 25a.

Further, the misbehavior and access problems noted in the Statement of the Case, *supra*, are comparable to those in *Schenck* and *Madsen*, albeit in a different context. *See Turner Broadcasting System*, 512 U.S. at 666 ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.") These "disturbing acts of harassment and intimidation," acknowledged by one *amicus*, *see* ACLU Br. at 12, required a response, and legislatures do not enter injunctions. The courts in *Schenck* and *Madsen* entered injunctions that applied broadly to a host of individuals and organizations, as well as unnamed and unknown individuals later found to be "in concert" with the defendants. *Madsen*, 512 U.S. at 759 n.1; *Schenck*, 519 U.S. at 366 n.3. Here the legislature addressed the problem as narrowly as possible considering both the harmful behavior of anti-abortion demonstrators and the harm likely if other groups adopted similar tactics outside medical clinics. *See Clark*, 468 U.S. at 296; *Heffron v. ISKCON*, 452 U.S. 640, 652 (1981).

The statute's effect on peaceful advocacy is minimal, requiring only a simple inquiry to "reach the minds [and hands] of willing listeners," *see Kovacs*, 336 U.S. at 87, and allowing clearly audible and visible messages near unwilling listeners. Regardless of Petitioners' and *amici's* protestations, it is impossible not to share the suspicion of a legislator that,

"[T]he only reason you would want this out of there, if you wanna get in my face closer than 8 foot and argue your case." J.A. 139. The statute prohibits only unconsented-to advocacy at such a personally invasive distance that it is coercive, physically intimidating and inescapable.

Petitioners' and *amici's* arguments advocate that this Court recognize a new First Amendment right to coerce listeners through physically invasive conduct — a right this Court has consistently **refused** to endorse. "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Demonstrators cannot "insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet." *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). A passerby "may be offered a leaflet but cannot be made to take it." *Kovacs*, 336 U.S. at 86-87.[20] This Court has recognized a distinction between general expressive activity and activity intrusively focused on a desired audience. *Madsen*, 512 U.S. at 769, *see also id.* at 780-81 (Stevens, J., concurring in part and dissenting in part). If there is "a substantial and justifiable" state interest in regulating speech "directed primarily at those who are presumptively unwilling to receive it," *Frisby*, 487 U.S. at 488, there is an even stronger interest in regulating the close proximity of speech directed at those who actually decline to receive it.

The rote invocation of the rule that those subjected to unwanted messages in public must simply turn away from them, or are "free to walk away," ACLU Br. at 5; *see also* ACLU Br. at 21, PETA Br. at 9, assumes demonstrators who observe minimum standards of behavior. The clear record

20. *See also City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (right recognized in previous cases "to tender the written material to the passerby who may reject it or accept it.").

before the legislature shows demonstrators who failed to observe such standards, converting the right to walk away into a right to be chased away from exercising another protected constitutional right by hostile mobs of demonstrators who used signs and leaflets as walls and weapons. J.A. 66-67, 70, 93-95, 98-100, 105-06, 154, 158-59; *see also* J.A. 218-26, 229-30, 273-83. Turning away from an unwanted message is also much more difficult when a patient, driven by need for medical treatment, must access a particular entrance door that has been laid siege to by demonstrators.

In the special circumstances outside health care facilities the need for safety and space is heightened. *See* J.A. 108 ("You don't need somebody standing in your face screaming at you when you are going in for what may be one of the most traumatic experiences of your life anyway." (statement of disabled patient who had undergone 35 surgeries)); *see also* J.A. 156-57, 228, 289. For those few close approaches that might not threaten, crowd, impede or obstruct, the statute imposes the slight burden of requiring a simple request to approach. There is no obvious alternative of a sufficiently clear and enforceable statute that could separate out those few close approaches that are non-threatening from the vast majority of unconsented, overly close approaches that have caused and will continue to cause access, health and safety problems if left unregulated.

Thus, even though not required to be under the applicable standard,[21] the statute is in reality the least restrictive alternative

21. Content-neutral time place or manner regulations cannot be held invalid "simply because there is some imaginable alternative that might be less burdensome on speech," *Ward*, 491 U.S. at 797, quoting *Albertini*, 472 U.S. at 689; *see also Turner Broadcasting System*, 520 U.S. at 218, and are narrowly tailored "so long as [they] promote[] a substantial government interest that would be achieved less effectively" in their absence. *Ward*, 491 U.S. at 799, quoting *Albertini*, 472 U.S. at 689; *see also Turner Broadcasting System*, 520 U.S. at 213-14.

to serve a compelling state interest. The restriction on physical blockades in subsection (2) dealt with only part of the problem before the legislature. It failed to adequately address either physical threats or crowds of demonstrators so numerous that both movement and effective law enforcement became unreasonably difficult. The legislature considered broader fixed buffer zones imposed by courts, and adopted the eight-foot zone of separation in part because it was narrower. J.A. 115-16, 122. The consent provision, rather than an immutable eight-foot zone of separation, was adopted in order to allow more speech. J.A. 82, 87, 114-15, 118, 137, 148, 185, 211, 214. Existing harassment and assault statutes had failed to address the problems created by crowds, and were discussed as subjective and difficult to enforce. J.A. 94, 124-25, 159. An amendment to make the harassment statute more specific to address some of the problems described was rejected as again subjective, difficult to enforce, and possibly content-based. J.A. 120-28.

There is no adequate alternative that accomplishes the goals of the challenged statute more narrowly. Petitioners and supporting *amici* have not articulated any.[22] Instead, they deny that the problem of violence and physical threats exists, AFL-CIO Br. at 3-4, 6, 10, 13, 15, Liberty Counsel Br. at 17 ("no evidence of violent activity"); assert (contrary to the legislative history) that other statutes adequately address the problem, Pet. Br. at 21 n.13, ACLU Br. at 12; or admit the problem but simply throw up their hands and state that the First Amendment leaves Colorado powerless to address such problems. ACLU Br. at 12-13. Such arguments, by their omission of any adequate alternative, demonstrate that the statute is the least restrictive alternative, and is narrowly tailored under any applicable test.

22. At least, none have been articulated to date in six years of legal proceedings and hundreds of pages of briefing.

E. The statute leaves open ample alternative channels of communication. The statute leaves open a wide range of communicative channels, through which demonstrators immediately outside health care facilities can still make their message known to their intended audiences of patients, staff, families, and passersby. Within 100 feet of health care facility entrances it allows standing in one spot and speaking, offering leaflets, or holding signs as people walk by at any distance.[23] It also allows walking up at any distance to anyone who has reached out their hand, nodded, or said "yes" to either the silent offer of a leaflet or a simple question such as "Can we talk?" or "Would you like this leaflet?" Under the statute, the opinions and consent of any bystanders or companions to the person approached do not control the legality of the approach. If some members of a group consent while others refuse, the demonstrator may continue to approach with the simple clarification that "I'm talking to her," or "I'm asking her."

Within 100 feet of health care facility entrances, the statute also allows speaking in normal conversational tones (or shouting and using bullhorns, if that is the demonstrator's choice), offering a leaflet or holding a sign, eight feet away from anyone who has refused consent or whose consent has not been requested. This includes walking towards someone and stopping at eight feet, walking alongside, or walking behind.[24] Finally, farther than 100 feet from health care facility entrances, the statute allows unrestricted approaches for speech, leafleting or picketing.

23. Standing in a blockade is prohibited by section (2).

24. Every law or injunction which includes a physical distance limitation is susceptible to possible accidental violation. *See, e.g., Burson v. Freeman*, 504 U.S. at 199. This is a criminal statute, however, and the burden is on the state to prove every element of the offense beyond a reasonable doubt. Only clear violations obvious to demonstrators, patients, and observing police officers, rather than *de minimus* violations of the statute by a few inches, will be provable or prosecutable.

The operation of the statute does not ban or significantly impair "normal," "traditional," or "peaceful" expressive activity, contrary to Petitioners' and *amici's* arguments. *See* ACLU Br. at 2, 7, 20; AFL-CIO Br. at 3, 7; PETA Br. at 22. The statute is not aimed at and barely affects traditional leafleting. Most leafletters stand or walk slowly, offering their leaflets with a question or exhortation, and either allow people to walk past them and take the leaflet or only step towards those who nod, hold out a hand, or respond verbally — all "consents" under the statute. The cases relied on by Petitioners and *amici* stand for the proposition that leafleting "may not be prohibited at all times, at all places, and under all circumstances." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). This Court has accordingly struck down bans on leafleting or licenses to leaflet in entire towns or other fora. *Id.*; *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938); *Schneider*, 308 U.S. at 162; *United States v. Grace*, 461 U.S. at 176. The cases are devoid of any indication that traditional protected leafleting (or, as Petitioners put it, the "most sacred archetype" of free speech, Pet. Br. at 43) includes the right to shove leaflets into car windows and faces, and to crowd and surround targets until they agree to accept the unwanted message. To the contrary, they support regulation of leafleting if "inconsistent with the maintenance of public order, or . . . involving disorderly conduct, **the molestation of the inhabitants**, or the misuse or littering of the streets." *Lovell*, 303 U.S. at 451 (emphasis added). *See also Schneider*, 308 U.S. at 162 (ordinance may not prohibit "a person rightfully on a public street from handing literature **to one willing to receive it**" (emphasis added)); *Jamison*, 318 U.S. at 416 (the right to express views "in an orderly fashion"); *Kovacs*, 336 U.S. at 86-87; *Taxpayers for Vincent*, 466 U.S. at 810. Thus the effect of the statute on leafleting is slight, serving only to protect the targeted individual's right to refuse an unwanted leaflet, and is not comparable to those broad bans on leafleting that this Court has found to raise constitutional problems.

III.

THE STATUTE IS NOT OVERBROAD.

Petitioners argue that the statute is overbroad, Pet. Br. at 22-27, a doctrine that is simply inapplicable to this time, place or manner regulation. Overbreadth, as Petitioners use it, applies to attempts to regulate to prevent a type of speech or activity that is unprotected because of its content, such as fighting words or fraud. Statutes that miss this target of unprotected speech or activity, and sweep too broadly to include protected speech, are overbroad. For example, in *City of Houston v. Hill*, 482 U.S. 451 (1987), the challenged ordinance attempted to prevent interference with police officers or fighting words directed at police officers. It was written so broadly, however, that it unconstitutionally criminalized any verbal interruption or verbal criticism of police. *Id.* at 461-62. The Court noted that the city was not powerless to punish "physical obstruction" of police. *Id.* at 462 n.11.

In *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), the statute in question attempted to regulate fraud by limiting a charity's expenses to only 25% of its total intake from solicitations. It was unconstitutionally overbroad because it operated on the "fundamentally mistaken premise" that high charitable fundraising expenses were an indication of fraud. *Id.* at 966.

Petitioners' overbreadth argument fails even if the doctrine is applied to this time, place or manner regulation because Petitioners never identify a fundamentally mistaken premise for the statute. To the contrary, the statute is based on a premise supported by social science, common experience, and specific testimony before the legislature: too-close, unconsented approaches by demonstrators immediately outside health care facilities endanger safe health care through physical intimidation, increase the risk of obstruction, and hinder law enforcement.

IV.

THE STATUTE IS NOT A PRIOR RESTRAINT: IT DOES NOT ALLOW A PUBLIC OFFICIAL TO PREVENT THE EXPRESSION OF A MESSAGE TO THE PUBLIC.

Prior restraints typically involve a public official censoring the expression of a message to the public because of its content, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), or denying use of an entire forum because of speech's content, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), all in advance of the actual expression.

The statute here simply does not fit within any understanding of a prior restraint, as shown by this Court's determination of the prior restraint challenges in *Schenck* and *Madsen*. The Court dismissed such challenges in footnotes, holding that there is no prior restraint if "alternative channels of communication [are] left open," *Schenck*, 519 U.S. at 374 n.6, and demonstrators "are not prevented from expressing their message in any one of several different ways; they are simply prevented from expressing it within [an appropriate] buffer zone." *Madsen*, 512 U.S. at 763 n.2. Likewise, here demonstrators may express their messages in any one of a number of ways; they are simply prohibited from expressing them while approaching unconsenting targets within eight feet. This is not a prior restraint.

Petitioners also disregard this Court's definition of prior restraints as regulations that give **public officials** censorship powers. *See, e.g., Southeastern Promotions*, 420 U.S. at 553.[25]

25. *See also Riley v. National Federation of the Blind, Inc.* 487 U.S. 781, 802 n.14 (1988) ("Secretary of State has unbridled discretion"); *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 763 (1988) ("unbridled discretion of a government official"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (same); *Secretary of State v. J.H. Munson Co.*, 467 U.S. at 964 n. 12 ("unguided (Cont'd)

A statute creating a limited buffer zone to allow medical patients to escape obstructive, in-your-face harangues is simply not analogous to the actions of a government censor denying access to an entire forum. Even if the decisions of patients are imputed to the government, the statute still cannot be a prior restraint because it restricts only overly close personal proximity and does not prevent the expression of any message. Demonstrators remain completely free to speak, picket, and leaflet in their chosen forum immediately outside health care facilities.

V.

THE STATUTE IS NOT VAGUE.

The statute uses easily understood terms and sets precise standards, regardless of Petitioners' attempts to obscure them. "Oral protest, education, and counseling" are not vague terms. Petitioners misleadingly quote the vacated Court of Appeals decision, Pet. Br. at 46, n.36, *see also* Life LDF Br. at 3, 7, 10-12, to further obscure the issue. The terms are reasonably intended and interpreted to refer to all oral communication of any content. Further, if the term "demonstrating" used in *Schenck* gave adequate notice of prohibited conduct, the more precise terms of this statute do as well. *See* 519 U.S. at 383, *see also Grayned*, 408 U.S. at 111 (prohibition on demonstrations "adjacent" to schools that "tend to disturb" class not vague).

(Cont'd)
discretion of the Secretary of State"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) ("licensing officials" had unbridled discretion); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("overly broad licensing discretion to an administrative office"); *Cox v. Louisiana*, 379 U.S. at 557 ("such broad discretion in a public official"); *Kunz v. New York*, 340 U.S. 290, 293 (1951) (discretionary power in "administrative official"); *Saia v. New York*, 334 U.S. 558, 560-61 (1948) ("uncontrolled discretion of the Chief of Police"); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) ("determination by state authority").

"Approach" is a commonly understood term, further clarified by the Colorado Supreme Court's determination that standing still would not violate the statute. Pet. App. 26a. The incidental movement of a hand, rather than movement of the whole body, will not trigger the statute.

Arguments on the vagueness of "consent" defy belief. Pet. Br. at 47-48, PETA Br. at 28, Life LDF Br. at 7. If consent is truly a vague term, thousands of sexual assault, assault and battery laws throughout the nation are void as well.[26] As in any criminal prosecution, consent is a question of fact to be determined by law officers, prosecutors, and the triers of fact in each case. Such questions of fact do not render the statute vague.

26. A search revealed 1,028 uses of the term "consent" in the Colorado Revised Statutes alone. *See, e.g.*, § 18-3-203(1)(e) (assault in the second degree); § 18-3-302(1) (second degree kidnapping); § 18-3-404(a) (sexual assault in the third degree), C.R.S. (1999).

CONCLUSION

The judgment below, upholding the statute as a reasonable exercise of the Colorado General Assembly's authority to ensure safety and order for citizens seeking access to health care, should be upheld.

Respectfully submitted,

KEN SALAZAR
Attorney General
MICHAEL E. MCLACHLAN
Solicitor General
FELICITY HANNAY
Deputy Attorney General
CAROL D. ANGEL*
Senior Assistant Attorney General
Attorneys for Respondents
Ken Salazar and State
of Colorado,
Bill Owens, Governor
1525 Sherman Street, Fifth Floor
Denver, CO 80203
(303) 866-5016

* *Counsel of Record*

ROGER W. NOONAN
MAUREEN HERR JURAN
GORSUCH KIRGIS LLP
Attorneys for Respondent
City of Lakewood
1515 Arapahoe Street
Suite 1000
Denver, CO 80202
(303) 376-5000

DEC 29 1999

(19)

Supreme Court, U.S.
FILED
DEC 28 1999
CLERK

No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONERS

THOMAS P. MONAGHAN
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
JOEL H. THORNTON
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thomas Jefferson St., NW
Suite 609
Washington, DC 20007
(202) 337-2273

Attorneys for Petitioners

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THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE

I. Respondents' Discussion of Unsworn Statements in the Legislative Record is Irrelevant to the Statute at Issue.

Respondents and their amici expansively discuss the unsworn statements in the legislative record. *See* Respondents' Brief ("Resp. Br.") 1-4; Brief Amicus Curiae of the United States ("U.S. Amicus Br.") 3-4; Brief Amici Curiae of the American College of Obstetricians and Gynecologists *et al.* ("ACOG Amici Br.") 3-6. This discussion is irrelevant to a proper analysis of C.R.S. § 18-9-122(3) (hereinafter, "the statute").[1]

Two points bear emphasis. First, nothing in Respondents' discussion implicates Petitioners (or the vast majority of Coloradans) whose constitutional rights of expression are nonetheless chilled by the statute. Respondents dredge up examples of physical abuse, grabbing, pushing, shoving, punching, crowding, or blocking access. Petitioners engaged in none of these activities and claim no right to do so.[2] *See* Pet. App. 10a n.7 (Colorado Supreme Court assumes "petitioners have not engaged in, and do not intend to engage in, such

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1. Respondents' discussion is not a *legislative* finding. Principally, it is a recitation of unsworn statements elicited during hearings on the bill that included the challenged statute. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (citation omitted). *A fortiori*, this Court is not limited by deference to Respondents' recitation.

2. Because Petitioners do not contest Colorado's power to enact appropriate public health and safety legislation, there is no need to pause over the arguments offered by the amici States in the Brief Amici Curiae of the State of New York *et al.* ("New York Amici Br."). The power to enact appropriate public health and safety legislation does not shelter Colorado's decision to target constitutionally protected expression directly. *See, e.g., Schneider v. State*, 308 U.S. 147, 162 (1939).

dangerous and harassing conduct").

Second, to the extent Respondents' invocation of violent misconduct has any relevance to this case, it is only to reinforce the statute's lack of narrow tailoring. Respondents and some who offered unsworn statements during legislative hearings preceding adoption of the statute emphasized the problem of threatening conduct. The statute at issue here, however, criminalizes protected speech, not such conduct. Indeed, the statute does not mention, let alone target or ban, physical abuse, grabbing, pushing, shoving, punching, crowding, or blocking access.

II. Respondents and Their Amici Have Misstated the Holdings of this Court.

At the outset, it is necessary to correct various misstatements made concerning this Court's precedents.

Respondents cite *United States v. Grace*, 461 U.S. 171 (1983), for the proposition that this Court may interpret the statute to "eliminate any possible constitutional question." Resp. Br. 22. Respondents show a fundamental misunderstanding of federalism. *Grace* is inapposite to the contended point. There, this Court authoritatively construed a *federal* statute, which it may do. Here, Respondents seek to have this Court authoritatively construe a *state* statute in a way that the *state* courts have declined to do. Even so, in *Grace*, this Court held that the statute, even as construed, was not narrowly tailored. 461 U.S. at 182.

Respondents cite *Rowan v. U.S. Post Office Dep't.*, 397 U.S. 728, 737 (1970), for the proposition that Colorado may grant to private citizens the power to deny to others the right to communicate in public. Resp. Br. 23. *Rowan* does not stand for that proposition. In *Rowan*, this Court upheld a postal regulation enforcing the right of individuals to prevent the

mailing of provocative materials to their homes. *See* 397 U.S. at 730. Thus, *Rowan* stands for the different, and quite limited, proposition that the occupants of a private home are the best judges of whether a written communication received *into the home* is an impermissible invasion. *Rowan* does not authorize Colorado to prohibit protected expressive activities in traditional public fora.[3]

Respondents rely on *Burson v. Freeman*, 504 U.S. 191 (1992), to justify Colorado's decision to use a content-discriminatory statute that targets only constitutionally protected speech. Reliance on *Burson* is misplaced. *Burson* addressed a legislative response to the unique problem of election fraud and corruption that restricted speech only on a single topic, only on election day. Under the electioneering ban, *any topic*, except elections, could be discussed. Here, by contrast, the statute restricts the speech of every person, every day, near every health care facility in Colorado, unless the listener consents. Contrasting this statute with *Burson* only underscores how content and viewpoint discriminatory the statute is in practice. If the Tennessee legislature had adopted the Colorado model, Republican voters could use criminal sanctions to suppress unwelcome political speech from Democrats, and vice versa.

Respondents invoke *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783-85 (1979). Resp. Br. 10. *Baptist Hospital*, which was not a First Amendment case, upheld the NLRB's determination that a hospital's ban on solicitation by employees inside the hospital, in the cafeteria, gift shop, or first floor lobbies, *was*

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3. Similarly, *Breard v. City of Alexandria*, 341 U.S. 622 (1951), does not support Respondents' position. Resp. Br. 23. *Breard* addressed a restriction only on commercial solicitations directed to homes, not to the traditional public fora where the challenged statute regulates speech.

not justified by the hospital's invocation of patient care needs, 442 U.S. at 786. *A fortiori*, the health care needs of patients provide even less justification for suppressing speech here, because the statute burdens constitutionally protected expression on public sidewalks, streets, and ways *outside* health care facilities.[4]

Finally, the United States argues that the zones struck down by this Court in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), encompassed passersby as well as those seeking to use or provide the services of protected clinics. *See* U.S. Amicus Brief 11. The explicit terms of the injunction in *Schenck*, 519 U.S. at 367 n.3, however, show that the invalidated zones only protected persons seeking access to the facilities.

III. Respondents and Their Amici Have Misstated the Operation of the Statute.

Only C.R.S. § 18-9-122(3) is at issue here.[5] Nonetheless, Respondents have misstated the purpose and scope of the statute that is the subject of Petitioners' challenge. In fact, Respondents spend much of their brief defending a statute that

4. For the same reasons, Respondents' invocation of *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring), is incorrect. There, this Court overturned a prohibition on leafletting and solicitation *inside* Beth Israel Hospital's cafeteria and coffee shop.

5. Other subsections of C.R.S. § 18-9-122 criminalize conduct that "obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility;" grant to certain cities and counties the power to adopt additional regulations to controlling access to health care facilities; and, authorize the imposition of civil liability for violations of the statute. *See* Pet. App. 65a. Of course, C.R.S. § 18-9-122(2) remains relevant because it is a direct response to unlawful conduct. The existence of the speech-restrictive § 18-9-122(3), on top of § 18-9-122(2)'s limitations on conduct, reinforces the absence of narrow tailoring.

the Colorado legislature did not pass.

From Respondents' brief, one would assume that the challenged statute:

- prohibits only "abusive conduct,"[6] "obstructive and uncontrolled demonstrations outside health care facilities,"[7] "nose-to-nose harangues,"[8] and "unconsented-to advocacy" that is "coercive, physically intimidating and inescapable";[9] and
- suppresses only "physical altercations between demonstrators and family members of patients, triggered by demonstrators' confrontational, in-your-face tactics."[10]

Respondents characterize the statute as mere legislative fine-tuning of "existing laws against assault."[11] The United States also asserts that the conduct prohibited by the statute includes "crowding, harassing, threatening, and coercive conduct in close proximity to patients." U.S. Amicus Br. 19.

The statute, however, does nothing to regulate crowding and threatening, and coercive conduct close to patients. This statute regulates only protected expression, not conduct. The statute does not even mention, let alone limit its reach to, assault, punching, threatening, intimidation, obstruction, haranguing, or

6. Resp. Br. 3; *id.* at 1.

7. Resp. Br. 1.

8. Resp. Br. 8; *id.* at 7, 23.

9. Resp. Br. 30; *id.* at 1, 26.

10. Resp. Br. 2; *id.* at 8, 13.

11. Resp. Br. 25.

surrounding.[12] The statute targets "passing a leaflet or handbill [], displaying a sign [], or engaging in oral protest, education or counseling. . . ." Pet. App. 65a. It regulates approaches undertaken to communicate with others whether or not accompanied by misconduct.

Respondents' characterization of the class of persons protected by the statute is also wrong. Nothing in the statute limits its protection to communicative approaches to disabled persons, medical patients, medical personnel, or their families and companions. In fact, Respondents state that "[t]he statute applies to all persons within this medical entrance zone. . . ." Resp. Br. 11.

Finally, the United States argues that the statute does not create floating speech-free zones "around persons who enter, leave or pass by a health care facility." U.S. Amicus Br. 11. The assertion flatly contradicts the description of the statute offered by the Colorado Supreme Court: "[t]he statute creates a limited floating buffer zone. . . ." Pet. App. 3a.

IV. The Statute Fails Constitutional Scrutiny.

Respondents do not dispute constitutionally significant conclusions about the activities affected by the statute and the nature of places where the statute operates. First, there is no dispute that the statute regulates constitutionally protected expression, *see* Pet. Br. at 16-17; J.A. 289-90 (Responses to Requests to Admit). Second, there is no dispute that the statute regulates speech in traditional public fora. *See* Pet. Br. 18; J.A. 290 (Responses to Requests to Admit). Where Respondents err is in applying the relevant scrutiny to the statute's restrictions

12. If the Colorado General Assembly had intended to restrict such unlawful conduct, it could have done so through the enactment of a statute targeting that conduct. The enactment of this statute, directly targeting protected speech, does not serve that intention.

on protected expression in the traditional public forum.

A. The Statute is Overbroad.

The statute is hopelessly overbroad.[13] While Respondents invite this Court to focus its attention on threatening approaches to patients and staff, they ultimately concede that the statute applies to all persons within 100 feet of the entrances to health care facilities, Resp. Br. 11, and that the statute is not limited to any particular type of health care facilities, *id.* Now Respondents request that the statute be construed to prohibit "*all communications* in order to eliminate any constitutional question." Resp. Br. 22 (emphasis added). Accordingly, the statute regulates not just abortion protestors, but everyone who comes within the zone, even if only to distribute pizza coupons. Despite the broad reach of the statute to *all* meaningful expression, uttered near *every* health care facility in Colorado, requiring consent before approaching to speak to *any* person, whether a patient or a passerby, Respondents and the United States still contend that the statute is not overbroad. *See* Resp. Br. 35; U.S. Amicus Brief 35-36 n.3.[14] They are wrong.

In *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), this Court described the overbreadth doctrine as including two different statutory defects. One defect is the consequence of legislative *overreaching* in pursuit of a core of regulable conduct. 467 U.S. at 964-65. The other category of defect, which is at issue here, is the problem of legislation that

13. The statute's overbreadth is aggravated by its vagueness, *see* Pet. Br. 45-50, and by Respondents' attempt to cure that vagueness by defining the key terms, "counsel," "education," and "protest," to include the universe of oral expression, *see* Resp. Br. 37.

14. The United States *asserts* that the statute is not overbroad but makes no independent, substantive argument to the point. *See* U.S. Br. 35-36 n.3.

directly targets only constitutionally protected expression. 467 U.S. at 965-66.[15]

Respondents argue that an overbreadth challenge does not lie here because "Petitioners never identify a fundamentally mistaken premise for the statute," Resp. Br. 35. This is wrong as a matter of fact and law. First, as a matter of fact, the Colorado statute is based on a "fundamentally mistaken premise" – namely that Colorado may address the problem of criminal conduct by targeting constitutionally protected speech. Respondents' submission is also wrong as a matter of law. With or without a "fundamentally mistaken premise," Colorado cannot target only constitutionally protected expression.[16]

The statute's scope is broader than the zones at issue in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), and *Schenck*. Respondents acknowledge that the class of persons from whom a speaker must obtain consent is broadly drawn to include "all persons within this medical entrance zone," Resp. Br. 11. Nonetheless, Respondents claim that the statute's broad categorization is "the most effective, least intrusive means to accomplish the legislature's public safety and health purposes." Resp. Br. 11. This Court's precedents belie the claim.

In *Madsen*, 512 U.S. at 773, this Court struck down a consent-to-approach requirement, although it was limited to Madsen's attempts to speak with persons seeking access to Aware Women's Health Center. Similarly, *Schenck* struck down a floating bubble zone although the zone only enveloped

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15. Even under a "substantial overbreadth" analysis, the statute fails scrutiny. *See Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574-75 (1987); Pet. Br. 22 n.14.

16. As in *City of Houston v. Hill*, 482 U.S. 451, 468 (1987), the statute "is a general prohibition of speech that 'simply has no core' of constitutionally unprotected expression to which it might be limited." (Citation omitted).

those seeking to use or to provide the services of the protected facilities. *Schenck*, 519 U.S. at 367 n.3.

Respondents' effort to avoid content-discrimination exacerbates the overbreadth problem of the statute. As Respondents would have it, the statute is so all-encompassing that it regulates *all communications*. Resp. Br. 22. This attempt to rewrite the statute runs headlong into this Court's analysis in *Madsen*:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' conduct is independently proscribable (*i.e.*, "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand. . . . The 'consent' requirement alone invalidates this provision: it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Madsen, 512 U.S. at 774 (citations and footnote omitted).

B. Section 18-9-122(3) Imposes an Unconstitutional Prior Restraint.

The statute imposes a prior restraint on protected expression by subjecting leafletting, sign displays, and oral protest, counsel and education, to the requirement of advance consent. *See* Pet. Br. 27-31. Respondents contend that conditioning the right to speak, to distribute leaflets, and to display signs on receipt of consent from private citizens does not result in a prior restraint on expression. The contention is wrong.

In fact, delegating authority to private persons to suppress protected speech, backed up by the criminal power of the state,

aggravates the prior restraint problem. By authorizing private persons – unconstrained by any regulations or government guidance – to decide what speech can be uttered, Colorado *guarantees* the sort of arbitrariness in decision-making against which the prior restraint doctrine guards.

In common with every prior restraint this Court has ever considered, the statute brings to bear the law enforcement mechanism of the State on the failure to obtain prior approval for constitutionally protected speech. Under the statute, failure to obtain consent before communicating is a criminal offense. This Court has never declared that the prior restraint doctrine would be inapplicable in circumstances such as those presented by the statute.[17]

Respondents claim that the statute cannot be a prior restraint in light of *Madsen* and *Schenck*. As Respondents would have it, *Madsen* and *Schenck* void the prior restraint doctrine whenever alternative channels of communication exist. Resp. Br. 36. Respondents are wrong.

In the first place, nothing in *Madsen* and *Schenck* purported to address the validity of prior restraints outside the context of injunctions regulating *conduct*. In *Madsen*, this Court found the prior restraint doctrine inapplicable to an injunction restricting conduct and only imposing *incidental* restrictions on expression. 512 U.S. at 763 n.2. In *Schenck*, 519 U.S. at 374 n.6, this Court reaffirmed that holding. From these two footnotes, Respondents craft the demise of the prior restraint

17. Petitioners take note of the brief amici curiae of the State of New York *et al*. No State, other than Colorado, has ever enacted a law remotely similar to the statute. The amici States argue for legislative *carte blanche*, leaving little doubt about the consequences of a decision by this Court sustaining the statute. Worse, the amici States would justify the statute's direct regulation of speech by discussing the law enforcement value of statutes that target *conduct*.

doctrine. There would be no substance remaining to the doctrine if it applied only in the rare case where no "alternative channels" of communication exist.[18]

C. The Statute Unconstitutionally Discriminates Based on Content and Viewpoint of Expression.

The statute is content-based.[19] It only applies to oral "counsel," "protest," or "education." A prosecution under the statute would not succeed without evidence that the utterance consisted of such "counsel," "protest," or "education." An examination of the content of the communication is inevitable. Otherwise, deciding whether an oral utterance had crossed the line would be impossible. For example, if one deliberately approaches another on a sidewalk and asks that person to pray with him, that simple question arguably[20] is not "counsel,"

18. So, for example, the availability of another theater would have compelled a different conclusion in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). And, the availability of home delivery and mail service would have led to the conclusion that it was not a prior restraint to grant unbridled discretion to the Mayor in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

19. Respondents hint that Petitioners waived the content discrimination issue. *See* Resp. Br. 6 n.6 (and accompanying text). The waiver allegation was fully discussed and debunked at the certiorari stage. *See* Reply to Brief in Opposition 4-6. Petitioners sought review in the Colorado Supreme Court on the content discrimination issue, *see* Reply to Brief in Opposition 5 n.4 (listing Petitioners' proposed issues), and the Colorado Supreme Court specifically denied review as to the content discrimination issue, *see* Pet. App. 59a.

20. Petitioners' uncertainty on this point highlights the statute's unconstitutional vagueness. Perhaps Respondents would conclude that prayers or questions are covered by the statute, *see* Resp. Br. 22 ("statute applies to all communication"). Of course, that exacerbates the statute's overbreadth problem.

"protest," or "education." The only *legal* difference between such an invitation to pray or a simple request for directions to a nearby landmark, which may not be covered by the terms of the statute, and a statement criticizing abortion, is the content of the utterance, even though they are indistinguishable under the Constitution.

To cure this problem (and to counteract the vagueness of the statute), Respondents urge this Court to erase the express terms "counsel," "protest," or "education," and substitute in their place the term "communication." Resp. Br. 18-24, 37. Such an approach only compounds the statute's *overbreadth*, and fails to cure its other content-based defects.[21]

The statute also discriminates on the basis of content and viewpoint because it allows the ultimate determination of whether speech is free or criminal to turn on whether an individual consents. Often, that decision will be based on the content or viewpoint of the speech. Nothing in the statute precludes decisions from being made on those grounds.

Respondents characterize the statute as accommodating the desire of medical patients, staff, and family to avoid unwelcome messages in close proximity. *See, e.g.*, Resp. Br. 8 (describing the statute as a restriction on "nose-to-nose harangues of an unwilling listener"). Of course, listeners are likely to reject communicative efforts precisely because they include unwelcome messages. Accordingly, "[t]he [statute] is justified *only* by reference to the content of speech." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (emphasis in original; citation omitted). This conclusion reflects the fact that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" sufficient to

21. This Court cannot do as Respondents request. It is beyond this Court's power to bind Colorado courts to its construction of Colorado's statute. *See, e.g., Spector Motor Service v. McLaughlin*, 323 U.S. 101, 104 (1944).

justify a content-based restriction on protected speech. *Id.* The statute unconstitutionally subordinates the right to freedom of expression to a right to be free from speech that is unwelcome or annoying. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking ordinance because its "violation may entirely depend upon whether or not a policeman is annoyed").

D. This Court Has Rejected Respondents' "Health Care" and "Right to be Left Alone" Exceptions to the First Amendment.

1. Respondents' "health care" exception

This Court has rejected Respondents' proposed "health care" exception to the First Amendment. Resp. Br. 1-3; ACOG Amici Br. 6-11; Brief Amici Curiae of National Abortion and Reproductive Rights Action League 13-26. In *Madsen* and *Schenck*, this Court swept aside consent to approach and floating bubble zone provisions allegedly justified by the exact health care concerns proffered by Respondents. No different result is justified here.

The "health care exception" argument goes as follows: Controversial, unwelcome, and upsetting speech causes stress, even severe stress. Stress is bad for health, particularly for the health of those undergoing medical procedures or suffering from medical conditions. Therefore, controversial speech can be restricted.

Obviously, the argument proves too much; its success would open a Pandora's Box of speech restrictions. A protest-free world would be "safer" in many ways. Pickets outside factories elevate stress for employees who cross the picket line and then, agitated because of their exposure to disapproving strikers, handle heavy machinery at grave risk to life and limb. Strikes outside airport terminals impair the mental concentration of air traffic controllers and pilots, with potentially devastating

consequences. Colorful signs distract passing drivers, causing accidents. Large assemblies risk riots or trampling, especially when the topic is a matter of passionate debate.

Furthermore, no logical or constitutional constraint justifies the conclusion that health concerns would be limited only to site-based protests. Being falsely portrayed in a widely distributed publication as a drunk in the pulpit and a partaker in illicit relations with his mother caused Reverend Jerry Falwell severe emotional distress. *Falwell v. Flynt*, 797 F.2d 1270, 1276-77 (4th Cir. 1986), *rev'd on other grounds sub nom. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Seeing her name in an article discussing a rape caused the victim to suffer significant emotional distress. *The Florida Star v. B.J.F.* 491 U.S. 524, 528 (1989). The written vitriol of editorialists, the damning summations of theater critics, and other contentious speech may aggravate heart conditions and nervous disorders in the targets of such caustic criticisms.

These considerations cannot mean that speech that disturbs others to the extent of jeopardizing health thereby loses constitutional protection. The framers of the First Amendment rejected the "health" of the straitjacket for the "hazardous freedom" guaranteed by the First Amendment. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969).

2. The "right to be left alone" exception

Respondents concede that the statute is not justified by reliance on the right to be left alone on public sidewalks. Resp. Br. 25. Instead, Respondents contend, the Colorado Supreme Court described the State's "compelling" interest in preserving safe access to health care. *Id.* Respondents and the court below ignore, however, the fact that the statute does not regulate *conduct* that prevents access, nor does it even classify all approaches as obstructive; it only targets protected speech.

E. The Statute Does Not Survive Scrutiny as a Regulation of Time, Place and Manner of Speech.

Even if it were analyzed as a content-neutral enactment, the statute does not survive constitutional scrutiny. Pet. Br. 37-45. Chief among the statute's defects are its broad scope and lack of tailoring. Indeed, Respondents urged this Court to give the statute an even broader reading. *See* Resp. Br. 22 (arguing for "implicit conclusion that the statute applies to all communication").

Respondents have failed to show any clear fit between the stated purpose of the Colorado General Assembly in enacting C.R.S. § 18-9-122 and the means adopted by the Assembly in the challenged subsection. C.R.S. § 18-9-122(1) states that the purpose of the statute is preventing obstruction of access to health care facilities. The challenged statute, however, does not address or prohibit obstruction of access to health care facilities.

As Respondents construe it, the statute prohibits all approaches undertaken with the purpose to communicate. This Court rejected just such an unconfined requirement of consent to approach others in *Madsen*. There, this Court described the difficulty of Respondents' task: "[I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons *seeking the services of the clinic*, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and ensure access to the clinic." 512 U.S. at 774 (emphasis added).[22] Moreover, the reasonable time, place, and manner "standard does not mean that a time, place, or manner regulation may burden substantially more speech

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22. Thus, even though the injunctive restriction in *Madsen* only affected approaches to those seeking the services of a clinic, this Court concluded that it burdened more speech than necessary. 512 U.S. at 774.

than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

The statute is a broad regulation of speech in a traditional public forum, rather than a narrowly tailored response to obstructive conduct. Respondents reply that the statute "barely affects traditional leafletting," Resp. Br. 34, an assertion quite contrary to the facts, the record, and the conclusions of the court below. The Colorado Supreme Court concluded that "leafletting is deterred under the statute." Pet. App. 27a. *See also id.* at 56a-57a. In *Schenck*, this Court found a similar restriction on leafletting to impose a troubling burden on speech:

> The floating buffer zones prevent defendants . . . from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.

519 U.S. at 377.

To justify the broadly drawn regulation, Respondents assert an interest in preventing willful obstructions of access to health care facilities. Respondents point to the particular problems of crowding and harassing conduct. *See supra* at 5. The statute, however, applies to *all* speech, and not just speech

accompanied by obstructive conduct or crowding. Respondents' conclusion that the statute is the archetype of narrow tailoring is, therefore, wrong.[23] This statute regulates "expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799.

The statute does not target threatening conduct. Indeed, the statute permits one to approach another in a threatening manner if speech does not accompany the approach. Nor does the statute merely target unprotected expression, such as fighting words or threats that are independently proscribable and may interfere with access. *The only purpose that the statute appears to serve is to insulate others from opinions and views with which they disagree.* This conclusion is consistent with the Colorado Supreme Court's assertion that it was balancing the right to freedom of expression against the right of privacy. Pet. App. 13a-16a.

In the end, however, Respondents expressly disclaim any reliance on the right to be left alone on public sidewalks and streets, Resp. Br. 25.[24] This Court's precedents leave Respondents with no choice. In *Schenck*, this Court seriously doubted that "the right of the people approaching and entering

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23. Respondents assert that statutes pose lesser risks of censorship or discrimination than injunctions. Resp. Br. 15. If so, it is true because injunctions, by their nature, allow the state to target specific actors. Just as true, however, and directly relevant here, is the countervailing principle that statutes pose greater risks of overbreadth and of chilling because statutes, by their nature, apply broadly to all citizens, not just malefactors.

24. That concession leaves Respondents without any interest to justify this section of C.R.S. § 18-9-122. Although Respondents invoke the interest in securing access to health care facilities to justify the challenged statute, that interest is fully served by C.R.S. § 18-9-122(2).

the facilities to be left alone . . . accurately reflects our First Amendment jurisprudence in this area" and expressly noted that *Madsen* "sustained an injunction designed to secure physical access to the clinic, but not on the basis of any generalized right to be left alone on a public street or sidewalk." *See* 519 U.S. at 383 (internal quotation marks omitted).

CONCLUSION

For the reasons stated above and in Petitioners' opening brief, this Court should hold that Colorado Revised Statutes § 18-9-122(3) is unconstitutional, the judgment below should be reversed, and the matter remanded with instructions to enter judgment for Petitioners.

Respectfully submitted,

THOMAS P. MONAGHAN
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
WALTER M. WEBER
JOEL H. THORNTON
AMERICAN CENTER FOR LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 609
Washington, DC 20007
(202) 337-2273

Attorneys for Petitioners

December 30, 1999.

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DEC 16 1999

FILED
DEC 16 1999
OFFICE OF THE CLERK

No. 98-1856

In the Supreme Court of the United States

LEILA JEANNE HILL, ET AL., PETITIONERS

v.

STATE OF COLORADO, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

DAVID K. FLYNN
LOUIS E. PERAERTZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

34 pp

QUESTION PRESENTED

Colorado Revised Statute § 18-9-122(3) prohibits a person, within 100 feet from any entrance door to a health care facility, from "knowingly approach[ing] another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area." The question presented is whether Section 18-9-122(3), on its face, violates the First Amendment.

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INTERESTS OF THE UNITED STATES

Colorado Revised Statute § 18-9-122(3) (1998) [hereinafter "subsection (3)"] prohibits a person, within 100 feet from any entrance door to a health care facility, from "knowingly approach[ing] another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area." Petitioners argue that this limitation on approaching violates the First Amendment.

The Attorney General of the United States has primary responsibility for enforcing the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), 18 U.S.C. 248. The Access Act prohibits, *inter alia*, the use or threat of force, or physical obstruction, to injure, intimidate, or interfere with any person because that

person is, or has been, obtaining or providing reproductive health services, or to intimidate them from doing so in the future. 18 U.S.C. 248(a)(1). The Access Act provides for criminal and civil enforcement by the Attorney General, as well as private civil enforcement. Injunctive relief is specified as a remedy available under that Act in civil actions brought by the Attorney General, 18 U.S.C. 248(c)(2)(B), and the injunctive relief obtained under the statute can include restrictions on the distance within which protesters may approach persons near a health care facility.[1] The principles that the Court articulates in this case could influence the scope of injunctive relief available under the Act. The United States therefore has a significant interest in the resolution of this case.

The United States also has a significant interest in seeing that adequate relief is available against those who impede access to medical clinics, as well as preserving the ability of citizens to exercise their First Amendment rights in a manner compatible with the rights of others.

STATEMENT

1. On April 19, 1993, Colorado enacted Colorado Revised Statute § 18-9-122. See J.A. 16-17; App., *infra*, 1a-2a. In subsection (1), the state legislature set forth its purpose:

> The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. * * *

[1] See *United States* v. *Scott*, 187 F.3d 282 (2d Cir. 1999) (upholding injunction prohibiting an individual with a record of harassment and violation of court orders from demonstrating within 14 feet of a clinic or positioning himself within five feet of persons who have indicated unwillingness to receive literature or speech from him).

To implement this purpose, subsection (2) makes it a misdemeanor if a person "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility," and subsection (3) establishes the approach limitation at issue here, making it a misdemeanor to "knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility."

The House and Senate Judiciary Committees of the Colorado legislature devoted considerable attention, during the hearings that preceded enactment of subsection (3), to the question of balancing the need of patients for safe, unobstructed access to health care facilities against the right of others to engage in expressive conduct. J.A. 58-216. Evidence was introduced at the hearings demonstrating that on numerous occasions, conduct by protesters outside health care facilities providing abortion-related services included efforts to block access to the facility, as well as to harass and intimidate patients and staff. J.A. 63, 66-71, 105. The

legislature also learned that efforts to identify persons who committed physical assaults outside health care facilities were unsuccessful because it was not possible to identify the assailants in the large crowd of people present. J.A. 94. In addition, witnesses testified that the presence of escorts for patients was insufficient to permit safe access to health care facilities. J.A. 70.

Evidence before the state legislature also established that, out of 60,000 patients who obtained services at one of the health care facilities discussed, only seven percent were there to seek counseling or services related to abortions. Nevertheless, all patients were subjected to the same treatment by protesters. J.A. 62. A witness, speaking on behalf of persons with disabilities, also testified about protests related to issues other than abortion, which escalated beyond aggressive advocacy and led to assaults on two people with disabilities. J.A. 155. The witness testified that protesters who use such tactics create a particularly difficult situation for persons with physical disabilities who are seen as "easy to push around." *Ibid.*

Proponents of subsection (3) argued that it was a reasonable time, place, and manner restriction (J.A. 60, 114, 116, 123), noting that the eight-foot approach limitation is smaller than restrictions found in some other statutes and ordinances (J.A. 61, 116, 149). Opponents argued that while some protesters may engage in obstructive or intimidating conduct, the pro-life movement is largely engaged in peaceful advocacy (J.A. 73, 96, 179, 181), and merely tries to provide information about alternatives to abortion (J.A. 73, 168, 181).

2. Petitioners are three individuals who demonstrate on sidewalks and roadways outside health care facilities where abortion counseling, services, and procedures are provided. Pet. App. 10a. Petitioners use various methods of communication to "educate, dissuade,

inform and advise individuals about abortion and abortion alternatives," including verbal communication, placards, leaflets, and other demonstrative devices. *Ibid.*

In October 1993, petitioners filed a complaint in state court seeking a declaratory judgment that subsection (3) violates their federal constitutional rights to freedom of speech, press, peaceable assembly, due process, and equal protection (J.A. 20-29) and seeking an injunction against enforcement of the statute by the State of Colorado and various state and local officials who were sued in their official capacities (collectively "the State"). Pet. App. 4a, 30a-31a. The trial court granted the State's motion for summary judgment, *id.* at 30a-37a, holding that subsection (3) is content-neutral and is a valid "time, place and manner" restriction, narrowly tailored to serve a significant government interest, *i.e.*, preventing the "abuses that impede ingress and egress to medical facilities," *id.* at 33a-34a. The trial court found that subsection (3) "leaves open ample alternative means of communication" because at the eight-foot distance petitioners' signs and leaflets can be seen, and speech can be heard. *Id.* at 34a. The trial court also held that the statute is not overbroad, vague, or an unlawful prior restraint. *Id.* at 34a-36a.

3. The Colorado Court of Appeals affirmed, likewise holding that subsection (3) is a content-neutral restriction narrowly tailored to serve a significant governmental interest, "namely, to ensure the safety and unobstructed access for patients and staff entering and departing from health care facilities." Pet. App. 43a. The court emphasized that reasonable alternative means for communication remain available, because the eight-foot limitation on nonconsensual approaches does not prevent the intended audience from hearing the oral communication or seeing the posters and signs.

Ibid. The court also rejected petitioners' claims that the statute is vague and a prior restraint. *Id.* at 44a-45a. The Colorado Supreme Court denied discretionary review. *Id.* at 46a.

4. Petitioners sought review in this Court. While their petition for certiorari was pending, the Court decided *Schenck* v. *Pro-Choice Network*, 519 U.S. 357 (1997). In *Schenck*, the Court upheld, against First Amendment challenge, an injunction banning "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances" to an abortion clinic (termed a "fixed buffer zone"), *id.* at 380-385,[2] but invalidated an injunction banning demonstrations "within fifteen feet of any person or vehicle seeking access to or leaving" a clinic (termed a "floating buffer zone"), *id.* at 377-380. The Court held that the fixed zone was necessary to ensure access by car and foot to the clinic entrances and parking lots, *id.* at 380, but the floating zone burdened more speech than was necessary and, because of the way it operated, made it difficult for a protester "who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction," *id.* at 378.

On February 24, 1997, this Court granted petitioners' petition for certiorari, vacated the Colorado Court of Appeals' judgment, and remanded the case for further consideration in light of *Schenck*. Pet. App. 47a-48a; 519 U.S. 1145 (1997).

5. a. On remand, the Colorado Court of Appeals again upheld subsection (3). Pet. App. 51a-57a. The court noted that *Schenck* "expressly declined to hold

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[2] The injunction permitted two sidewalk counselors to continue their activities on condition they would back off to a distance of 15 feet if the target of the counseling so requested. 519 U.S. at 367.

that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises and protestors." *Id.* at 55a. The court of appeals ruled that "the applicable analysis to assess the statute before us" (as opposed to the injunctions at issue in *Schenck* and in *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994)), "is that adopted in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989)." Pet. App. 55a.

Applying the *Ward* standard, the court of appeals ruled that subsection (3) is constitutional. It emphasized that the eight-foot limitation imposed on nonconsensual approaches was justified by the governmental interests (supported by evidence that was before the legislature) in ensuring access to medical care by all persons, not just those seeking abortion services, including "persons with disabilities who lack the physical ability to move through crowds." Pet. App. 56a. The court also found that ample alternative channels for communication other than leafletting were available within 100 feet of the entrance to health care facilities, including oral speech, placards, and other visual items. *Id.* at 57a. The court rejected petitioners' contention that it was too difficult to maintain the necessary distance from nonconsenting persons, emphasizing that the statute prohibits only nonconsensual approaches within eight feet that are made "knowingly," so that a prosecution could not be based on an inadvertent violation. *Ibid.*

b. The Colorado Supreme Court granted review, limited to the question whether subsection (3) is constitutional in light of *Schenck*. Pet. App. 58a-59a. The Court concluded that the statute at issue in this case should receive more deference than the injunction at issue in *Schenck*, *id.* at 19a; that the statute is content-

neutral and therefore properly analyzed under the *Ward* standard; *id.* at 21a-22a, and that it constitutes a reasonable restriction on the time, place, and manner of petitioners' speech, *id.* at 22a-28a.

The court found that subsection (3) furthers the significant government interest in ensuring access to health care facilities to obtain medical counseling and treatment which, the legislative record established, was being hampered by "harassing, confrontational, and violent conduct." Pet. App. 26a. The court also found that the statute is narrowly drawn to further that interest, distinguishing the restriction in *Schenck* on several grounds. First, the requirement of a "knowing[] approach"—including both a mens rea requirement ("knowingly") and an actus reus requirement ("approach")—eliminates the risk that protesters could violate the restriction inadvertently, or even by deliberately standing still while an individual approaches the protester. *Id.* at 24a-25a. The court explained:

> If one of the petitioners is standing still within the fixed buffer zone, and an individual walks toward him or her, the petitioner need not change his or her physical positioning to maintain eight feet of distance and thus avoid violating the statute, even if the approaching individual comes within less than eight feet of the petitioner. In other words, so long as the petitioner remains still, he or she cannot commit the actus reus of approaching, even though he or she may well have the requisite mens rea of "knowingly." Thus, in any scenario, petitioners are free to attempt to speak with whomever they wish and they will not violate the statute, so long as the mens rea and actus reus do not coincide. * * * Therefore, any risk of an inadvertent violation involving an "innocent" passer-by is, at most, de minimus.

Ibid.; see also *id.* at 28a.

Second, the eight-foot limitation on approaches established by the Colorado statute is small enough to allow protesters to communicate across that distance in normal conversational tones, unlike the fifteen-foot buffer zone in *Schenck*. Pet. App. 28a. The Colorado Supreme Court therefore did not believe that, "even under the *Schenck* test, [subsection] (3) burdens more speech than is necessary." *Ibid.*

Finally, the Colorado Supreme Court held, subsection (3) allows ample alternate means of communication. Pet. App. 26a-28a. The court emphasized that "[p]etitioners, indeed, everyone, are still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion." *Id.* at 26a-27a. "On its face, there is nothing that prohibits protesters from being seen and heard by those accessing health care facilities as well as passers-by." *Ibid.*

SUMMARY OF ARGUMENT

Subsection (3) of Colorado Revised Statutes § 18-9-122 limits to eight feet the distance within which a person can knowingly approach another person who is within 100 feet of a health care facility, without that latter person's consent. The statute is intended to ensure safe, unobstructed access to health care facilities in the State. It is aimed at prohibiting the crowding, harassing, coercive, and threatening conduct in close proximity to patients which the legislative record demonstrated often accompanies communication in front of health care facilities and impedes safe, unobstructed access to them. Subsection (3) does not create a floating buffer zone or a speech-free zone. Petitioners remain free to engage in communicative conduct, such as

oral persuasion, leafletting, and sign displays, within arms' length of persons entering and leaving a health care facility (as well as passers-by), while standing on the public way leading to health care facilities. What petitioners cannot do within 100 feet of the entrance to a health care facility is knowingly approach a person closer than eight feet without the person's consent.

Subsection (3) is a valid, content-neutral regulation of the time, place, and manner of speech. The fact that it applies to approaches for the purpose of engaging in oral protest, education, or counseling does not render it content-based. The limitation applies irrespective of the subject or the viewpoint. The statute also is not content-based merely because it leaves unregulated a small category of everyday communications or because it allows a person to deny consent for a speaker to approach within eight feet.

The statute furthers the government's significant, indeed compelling, interest in ensuring its citizens the freedom to seek lawful medical services by providing for safe, unobstructed access to health care facilities, without burdening more speech than necessary. The statute is narrowly tailored to address the problem of expressive conduct that threatens safe access to health care facilities, because the statute merely imposes a limitation on approaches to persons who do not want to be in close physical proximity to protesters. That tailored approach is particularly appropriate here where the majority of such persons are seeking medical services and frequently are vulnerable because of an illness, and may not be able to choose a different health care provider because of limitations imposed by insurance or accessibility. The statute leaves open ample alternative means of communication. The eight-foot limitation on approaches does not prevent communication at closer range if the protestor is stationary

and the distance is closed by the listener. And, even at eight feet, speech can be readily heard and placards clearly seen.

Even if subsection (3) is analyzed as a content-based limitation, it survives constitutional scrutiny in light of the compelling government interest at stake and the narrowly tailored nature of the limitation on approaches.

ARGUMENT

COLORADO REVISED STATUTE § 18-9-122(3) IS NOT FACIALLY INVALID UNDER THE FIRST AMENDMENT

A. Subsection (3) Is A Reasonable Regulation Of The Time, Place, And Manner Of Speech Rather Than Its Content

1. Subsection (3)'s prohibition on an approach at a distance closer than eight feet, within 100 feet of the entrance to a health care facility, regulates the conduct of speakers and not their message. There is no message that petitioners are prevented from communicating to people entering, leaving, or passing by a health care facility. Nor does the statute create a speech-free zone around persons who enter, leave, or pass by a health care facility, like the zone disapproved by this Court in *Schenck*.

First, what is prohibited within eight feet of a targeted listener is not speech, but only a "knowing[] approach." If the distance between speaker and audience is closed by the listener and not by the speaker, there can be no violation of the statute. Thus, petitioners may station themselves on the public way or sidewalk leading to a health care facility, including near the entrance, in a location that must be passed by anyone entering or leaving the facility, and there petitioners may engage in any manner of communication

directed toward those entering, leaving, or passing by the facility—including speaking, leafletting, and sign displays—even if they are only a few feet from such persons.

Second, if protesters are not successful in stationing themselves closer than eight feet to their audience without making a prohibited approach, the eight-foot limitation on approaches created by the statute is sufficiently modest to permit protesters to deliver their message in normal conversational tones, and to display signs and posters that can easily be seen and read. See *Madsen*, 512 U.S. at 770 (demonstrators could "still be seen and heard" at a distance of 10 to 12 feet). The only thing petitioners may not do is pursue within striking distance of their audience. Eight feet is close enough to deliver a message, but not close enough to obstruct access or to deliver a blow.

Thus, it is not true, as petitioners' amici claim (American Federation of Labor and Congress of Industrial Organization (AFL-CIO) Br. 7), that the statute "entirely precludes normal handbilling and leafletting." What it precludes is an unconsented approach at a distance of less than eight feet. For example, some persons entering or leaving the facility may seek to maximize the physical distance between themselves and petitioners. In that circumstance, the limitation on approaching prohibits protesters from following or pursuing the person at a distance closer than eight feet. More generally, the limitation prohibits protesters from closing the distance between themselves and others, including in some instances, in a targeted manner that can easily resemble an assault or quickly lead to obstructive behavior.

In *Schenck* the Court expressly reserved the possibility that government interests could "justify some sort of zone of separation between individuals entering

the clinics and protesters, measured by the distance between the two." 519 U.S. at 377. Colorado has carefully avoided the deficiencies this Court identified in *Schenck* as fatal to the zone created in that case. First, unlike in *Schenck*, what is prohibited here is not speech but an "approach," and, therefore, there is no zone that "floats" with the listener in a way that lets him or her push a speaker into the street or into violation of the law by walking near the speaker. And second, the eight-foot limitation on approaches created here, unlike the 15-foot zone struck down in *Schenck*, is narrowly tailored to the purpose of preventing assaults, intimidation, and obstruction without unduly burdening speech.

2. a. Subsection (3)'s limitation on the distance within which a person can approach for the purpose of certain specified types of expressive conduct does not depend on the content of that expression. With respect to the display of signs or the passing of a leaflet or handbill, the content-neutrality of the statute cannot fairly be disputed. See Pet. Br. 9 (noting that eight-foot limit on nonconsensual approaches within 100 feet of health care clinic applies to pizzeria employee distributing coupons, nurse distributing flyer about working conditions, and evangelist distributing religious tracts). Thus, it is clear that the constitutionality of those limitations under the First Amendment is properly decided by determining whether they are reasonable time, place, or manner restrictions. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790-791 (1989).[3]

Petitioners claim (Br. 32, 34) that when the limitation is applied to unconsented oral protest, education, or

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[3] There appears to be no dispute that the public way and sidewalk areas covered by subsection (3) are areas that the Court has traditionally treated as a public forum.

counseling, it becomes content-based and, thus, subject to a higher level of constitutional scrutiny. That is incorrect. To begin with, subsection (3)'s limitation on approaches is not based on the subject matter or viewpoint of the communication. It applies to persons who knowingly approach for the purpose of protesting, educating, or counseling about animal testing, labor issues, religion, politics, or any other subject. And it applies to persons who approach for the purpose of protesting, educating, or counseling about any side of any issue. Indeed, subsection (3) applies not only to protesters, but also to escorts at a health care facility who, like all others, cannot, within 100 feet of the door of a facility, knowingly approach within eight feet of someone for the purpose of protesting, educating, or counseling, unless they obtain the consent of that person. Thus, the conduct limitation here is far different from the viewpoint and subject-matter distinctions at issue in cases such as *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 502 U.S. 105, 115-118 (1991); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381-385 (1992), and the restrictions placed on speech because of listeners' reactions in cases such as *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 868 (1997); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 133-135 (1992); and *Boos* v. *Barry*, 485 U.S. 312, 321 (1988).

The history of subsection (3) confirms that it prohibits a person from knowingly approaching within eight feet of another person irrespective of whether the person is an opponent or proponent of abortion rights, animal rights, Medicaid regulations, or labor issues. A witness before the Colorado legislature, speaking on behalf of persons with disabilities, testified about instances in which animal rights activists and anti-

Medicaid protesters engaged in assaultive, obstructive, and intimidating conduct that impeded the access of those with disabilities to medical facilities. J.A. 107-108. The legislator who proposed what became subsection (3) expressly referred to that testimony in describing the "overall purpose of this Bill, which is not directed solely toward [any] type[] of clinic[], but, rather, towards the right of any patient to seek the medical treatment they need." J.A. 113. Thus, there is no evidence that the State "adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.[4]

Rather than being aimed at any particular speech content, subsection (3) is aimed at the conduct that the legislative record demonstrated often accompanies communication in front of health care facilities and impedes safe, unobstructed access to them. That conduct includes crowding, harassing, threatening, and coercive conduct in close proximity to patients.

The Colorado legislature had a substantial basis to conclude that expressive conduct near the State's health care facilities often leads precipitously to obstructive and assaultive conduct. Several persons who escorted patients from their cars into reproductive health care facilities testified before the legislature that protesters surrounded vehicles and patients from the time they entered the parking lot until the entrance of health care facilities in order to prevent patients' access to the facilities. J.A. 70-71, 98-99, 105. One escort testified about her experiences before the enactment of

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[4] Indeed, that subsection (3) was not enacted to regulate disfavored speech is confirmed by the fact that it does not protect any patient, doctor, or passer-by from hearing and seeing any protester's message, however offensive to them, and at most keeps the speaker eight feet from the listener.

a Denver ordinance that placed an eight-foot buffer between protesters and patients:

> Being an escort at that time was truly a frightening experience. We weren't afraid of signs, we weren't afraid of pamphlets, we weren't afraid of words. We were afraid of being physically assaulted, which we were numerous times. We were sorely afraid for our physical safety.

J.A. 93. Another escort testified that she had "been hit by men twice [her] size" while trying to escort patients into a health care facility. J.A. 105.

b. Petitioners are understandably vague about the nature of the alleged content discrimination about which they complain. They note only (Pet. Br. 32 n.23) that the greeting "good morning," or the recitation of a few lines of literature, would not be subject to the statute. Petitioners' amici similarly emphasize (American Civil Liberties Union (ACLU) Br. 10; AFL-CIO Br. 8) that subsection (3) allows a person to approach another person within eight feet to ask for directions or for the time, regardless of whether they are within 100 feet of the entrance to a health care facility. Admittedly, such fleeting, ordinary communications do not appear to constitute the sort of "protest, education, or counseling" that is the subject of the statute. But those trivial exceptions do not render subsection (3) the sort of content-based statute to which this Court has ordinarily applied strict scrutiny.

The statute does not except such communications because of some legislative preference for their content. It is simply that such everyday communications are much less likely than protest, education, or counseling to implicate the concerns that prompted the Colorado legislature to act. Such communications are generally random and fleeting and rarely, if ever, are accompanied by the sort of obstruction, hounding, or other coercive conduct that reasonably could be perceived as threatening. Moreover, that the statute merely leaves unregulated a small category of everyday communications does not render it content-based. The limitation in this case is as content-neutral as was the provision at issue in *United States* v. *Grace*, 461 U.S. 171 (1983), where the Court considered a statutory ban, on the grounds of the Supreme Court, on the display of a "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." *Id.* at 176. The Court interpreted the statute to apply to signs, picketing, and leaflets. *Ibid.* And, although that statute technically was not oblivious to content because it banned the specified expressive conduct only if it was "designed or adapted to bring into public notice [a] party, organization, or movement," the Court concluded that it encompassed "almost any" sign or leaflet carrying a communication, *ibid.*, and treated the ban as a "facially content-neutral" prohibition, *id.* at 181 n.10, that was properly analyzed under the time, place, and manner standard. *Id.* at 181-184.[5]

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[5] Amici AFL-CIO suggests (Br. 8), without citing any support in state law, that the approach limitation of subsection (3) ordinarily would not apply to the solicitation of funds for a charity, the promotion of free samples of a commercial product, or the conduct of a survey. Whether or not that is so, those are different "types of expressive conduct" and the Court has not viewed prohibitions that distinguish among such types of speech as raising content discrimination issues. See *Grace*, 461 U.S. at 181 n.10 (prohibition on certain communicative displays held to be content-neutral despite fact that it did not purport to prohibit oral expression); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-649 (1981) (restriction only on distribution and sale of written materials and solicitation of funds held to be content-neutral because it applied evenhandedly to all who engaged in that type of expressive conduct).

c. Petitioners (Br. 33) and their amici (ACLU Br. 12) are incorrect when they argue that, because the statute allows a person to determine if a protester may approach within eight feet of the person by deciding whether to give consent to an approach, it is content-based. The Court rejected the same argument in *Schenck*. In *Schenck*, 519 U.S. at 384, the Court upheld a portion of the injunction that applied to the two protesters who were allowed to remain in the 15-foot fixed buffer zone around the clinic, and required them to cease and desist and to back away 15 feet whenever a targeted person indicated that he or she did not want the counseling they offered. The Court rejected the contention that the provision was content-based even though "it allows a clinic patient to terminate a protester's right to speak based on, among other reasons, the patient's disagreement with the message being conveyed." *Ibid.*

Similarly, in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), a religious group had argued that a restriction was content-based because it limited the distribution and sale of written material and charitable solicitations at a state fair to a booth and, thus it required that they "await expressions of interest from fair patrons" before engaging in the specified expressive conduct. *Id.* at 649 n.12. The Court rejected the claim that the restriction was content-based simply because it "prefer[red] listener-initiated exchanges to those originating with the speaker." *Ibid.* The Court reasoned that that aspect of the restriction was "inherent in the determination to confine [such expressive conduct] to fixed locations," it applied alike to all such expressive conduct, and thus did not "invalidate the [restriction] as a reasonable time, place, and manner regulation." *Ibid.*

Petitioners' similar argument should fare no better here. The Colorado statute leaves petitioners free to communicate their message at a distance of eight feet, or closer if no knowing approach is involved.

3. The constitutionality of a statutory content-neutral time, place, or manner restriction is assessed under the standard set forth in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), and similar cases. *Madsen*, 512 U.S. at 764. A content-neutral restriction on speech is consistent with the First Amendment if it furthers a legitimate, content-neutral governmental interest, is narrowly drawn to accomplish that interest, and leaves open ample alternatives for communication. *Ward*, 491 U.S. at 797-799 (citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)). Put another way, such a statute is constitutional if it does not burden "substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

a. Subsection (3) meets that test. It furthers Colorado's significant, indeed compelling, interest in ensuring its citizens the freedom to seek lawful medical or counseling services by providing for their safe access to health care facilities, which the state legislature described as "imperative." Pet. App. 64a. The State undoubtedly has a substantial interest in protecting persons in need of medical care from invasive, unwanted physical approaches. Cf. *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 624 (1995) (upholding against First Amendment challenge state bar rule that prohibited personal injury lawyers from sending targeted direct mail solicitations to victims and their relatives within 30 days of an accident or disaster); *National Labor Relations Bd.* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 783 n.12, 784 (1979) (approving no-solicitation rule not only in patient-care areas of hospital, but also in more

common areas where patients, families, and doctors are frequently present, "often during times of crisis," and noting "the importance of maintaining a peaceful and relaxed atmosphere within hospitals"). Subsection (3) was enacted against a background of "widespread, violent confrontations" (Pet. App. 6a), and furthers the State's interest in ensuring public safety and order and promoting the free flow of traffic on public streets and sidewalks. The combination of those interests fully justifies an appropriately tailored statute. Cf. *Schenck*, 519 U.S. at 376 (injunction provisions justified by governmental interest in ensuring public safety and order, including concern about "the fights that threatened to (and sometimes did) develop," and in promoting the free flow of traffic at such locations); see also *Madsen*, 512 U.S. at 767–768.

b. (*i*) Subsection (3) is narrowly drawn to accomplish the governmental interests at stake. It is tailored to address the particular problem that was before the Colorado legislature—overly close, harassing, and coercive conduct that threatened the safe, unimpeded access to health care facilities. Evidence before the state legislature demonstrated that less restrictive alternatives had not been successful in achieving that goal. Medical staff personnel who escorted patients to clinics in the presence of protesters testified that their presence did not prevent obstructive, intimidating, and assaultive activity. J.A. 67, 69-71, 93-94, 98-99, 105-106, 108-109. Also, the state legislature had before it evidence that a local city ordinance that relied on an eight-foot limitation had been shown to provide the space necessary to ensure unimpeded access to a health care facility. J.A. 71, 154. The evidence indicated that enforcement of assault laws was hampered by the inability to identify assailants in the large crowd of people present, see J.A. 94. Cf. *Schenck*, 519 U.S. at

382 (noting that "a prophylactic measure was even more appropriate" because defendants' harassment of police "hampered the ability of the police to respond quickly to a problem"); see also *Burson* v. *Freeman*, 504 U.S. 191, 206-207 (1992) (plurality opinion) (noting that other means of prohibiting intimidation at polls were not adequate because acts of interference at polls would go undetected since law enforcement officers are generally barred from the vicinity to avoid appearance of coercion in election process).

As explained above (pp. 11-13), subsection (3) imposes a limitation on approaches, not a prohibition on all speech within a particular zone. Petitioners remain free to station themselves along the public way leading to a health care facility and communicate their message in any manner within arms' length of all those who pass. Thus, the limitation of subsection (3) applies principally where the target of the speech does not want to be in close physical proximity to protesters. Even then, the limitation is tailored so that the person who does not consent to the approach is able to avoid only the physical proximity of the speaker, not speech which he or she can both see and hear at eight feet.

The narrowly drawn limitation of subsection (3) is wholly consistent with the recognition by this Court in certain situations that the First Amendment does not provide an unlimited right to force speech upon unwilling listeners who take steps to avoid the speech. The Court has long recognized that there is no right to make a passer-by take a leaflet. See *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949) (plurality opinion); *Schneider* v. *New Jersey*, 308 U.S. 147, 160 (1939) (protesters could not "insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet"); *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810

(1984) (passer-by may accept or reject written material offered to him). That recognition is particularly important here, where the State was prompted to act by evidence that citizens were being denied the ability to turn away or avoid unwanted speech because of the accompanying coercive and threatening conduct. Moreover, the intended audience consists in large part of persons seeking medical care or counseling who, in many instances, are ill or in a physically weakened condition and may not be able to choose a different health care provider because of limitations imposed by insurance or accessibility. The statute is narrowly drafted to shield them not from the message proffered by protesters—the speech—but from a close physical approach that would be threatening, intimidating, or otherwise physically harmful. Cf. *Frisby* v. *Schultz*, 487 U.S. 474, 484-485 (1988) (recognizing the government's interest in protecting people from unwanted speech in their homes where they are captive and cannot avoid speech they do not want to hear); *Rowan* v. *Post Office Dep't*, 397 U.S. 728, 738 (1970) (same).

(*ii*) The eight-foot limitation on nonconsensual approaches within 100 feet of the entrance to a health care facility is substantially less restrictive than the 36-foot buffer zone on public property around clinic entrances upheld in *Madsen* in which all "congregating, picketing, patrolling, [and] demonstrating" was banned. 512 U.S. at 768-770. Subsection (3) is also more narrowly tailored than the 15-foot buffer zone around clinic entrances, which permitted only two protesters therein and which was upheld in *Schenck*. 519 U.S. at 380-381 & n.11. Moreover, the record underlying enactment of subsection (3) is similar to the evidence on which this Court relied in *Schenck* to uphold the ban on all demonstrations (except for two counselors subject to a cease-and-desist requirement) within 15 feet of entrances to medical facilities. The Court emphasized (*id.* at 381-382) that

> the District Court was entitled to conclude that some of the defendants who were allowed within 5 to 10 feet of clinic entrances would not merely engage in stationary, non-obstructive demonstrations but would continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars.

In light of the evidence before the Colorado legislature of threatening conduct that escalated to assaults, the legislature was entitled to conclude that, if approaching protesters were not kept a short distance from those who take steps to avoid the protesters, such assaultive or threatening behavior would recur.

Petitioners attempt (Br. 37) to equate subsection (3) to the 300-foot injunction provision struck down in *Madsen* which restricted demonstrators from approaching any person seeking services at the clinic unless that person indicated a desire to communicate. Subsection (3) is different from that injunction provision in several significant respects. First, the limitation on approaches ensures that the speech will still be heard by the intended audience because the approacher can remain within a eight-foot distance from which his or her speech can be heard and any displayed sign or placard seen. Thus, patients and passers-by still must tolerate any speech they believe to be "insulting, and even outrageous." See *Madsen*, 512 U.S. at 774. Second, the consent provision applies only to approaches that are knowing. Third, the limitation here specifies the prohibited distance of approach, curing the uncertainty present in *Madsen*. Fourth, the eight-foot

limitation on nonconsensual approaches applies only within 100 feet of a health care facility, one-third of the distance in *Madsen*.

(*iii*) Petitioners (Br. 25-26, 43-44) and their amici (AFL-CIO Br. 7; ACLU Br. 21) argue that subsection (3) cannot pass constitutional muster because the eight-foot limitation on nonconsensual approaches prohibits "normal handbilling and leafletting." But, as explained above (pp. 11-12), traditional leafletting is only minimally affected by the statute. The statute does not restrict a leafletter from stationing himself in one location and handing out leaflets to persons walking by that location. It merely limits a leafletter situated within 100 feet of the entrance to a health care facility from knowingly approaching within eight feet of a person who declines to pass closely by or to give consent for a closer approach. Within the 100-foot area, leaflets can be seen and offered in non-obstructive, non-violent, ways, including by persons standing on the public way itself. When the limit on approaches applies, if a protester shows the leaflet to a person at eight-feet and the person wants the leaflet, it takes only a step or two from either person for the leaflet to be handed over.

The Court has held that a much broader restriction on the distribution of leaflets is permissible as a time, place, and manner restriction. In *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court upheld a state agency rule that made it a misdemeanor to, *inter alia*, distribute any printed or written material at a state fair from any location other than a stationary booth. The Colorado statute's limitation on nonconsensual approaches within eight feet of another person for purposes of distributing leaflets is far less of a restriction than the limitation in *Heffron*.

(*iv*) When determining whether a statute is narrowly tailored, the Court does not "sift[] through all the available or imagined alternative means" of regulation, but instead finds that requirement satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 797-799 The determination by the Colorado legislature that an eight-foot distance was the appropriate limitation to ensure safe, unobstructed access to state health care facilities satisfies that standard and should be accorded deference. In *Burson*, 504 U.S. at 381, the Court deferred to the determination of a state legislature that had enacted a restriction on all campaigning speech within 100 feet of polling places. The Court specifically rejected the state supreme court's decision that 25 feet would suffice, as opposed to the 100 feet imposed by the legislature, holding that the legislature did not make an unconstitutional choice in forcing its citizens to walk an additional 75 feet. See also *Schenck*, 519 U.S. at 377 (although "one might quibble about whether 15 feet is too great or too small a distance if the goal is to ensure access," the Court "defer[red] to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear"); *Madsen*, 512 U.S. at 769-770 ("some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review").

Contrary to the arguments of petitioners (Br. 42-43) and their amici (ACLU Br. 20), Colorado should not be limited to ensuring access to clinics only through enforcement of its statutes prohibiting obstruction, violence, or harassment. As this Court noted in *Schenck*, 519 U.S. at 381-382, it has rejected that notion in cases such as *Burson*: "Intimidation and interference laws

fall short of serving a State's compelling interests because they deal with only the most blatant and specific attempts to impede elections." 504 U.S. at 206-207 (internal quotation marks omitted). Colorado determined that its laws prohibiting obstruction and harassment were insufficient to protect the interest in ensuring access to medical care. That finding is reasonable and supported by the legislative record. See p. 20, *supra*.

c. The Colorado statute leaves open ample alternative means of communication. Indeed, subsection (3) does not ban any speech, protests, demonstrations, placards, or signs from any sidewalks or other areas. Petitioners can communicate any message they want to all persons entering or exiting a health care facility or passing by. Petitioners are able to protest, educate, counsel, or engage in any other expressive conduct on the public way or sidewalk outside a health care facility, within arms' length of persons entering and leaving, while standing in one place. Only when a person denies consent for petitioners to approach him or her within eight feet does the eight-foot approach limitation apply. And, even at a distance of eight feet, speech can easily be heard and placards clearly seen. See *Madsen*, 512 U.S. at 770 (where demonstrators allowed to get within only ten to 12 feet of their intended audience, demonstrators could "still be seen and heard").

B. Even If Subsection (3) Is Analyzed As A Content-Based Limitation, It Survives Constitutional Scrutiny

As demonstrated above, subsection (3) is not content-based, but even if it were, it would survive constitutional scrutiny. A content-based restriction on speech is valid if it is necessary to serve a compelling state interest and is narrowly tailored to serve that end.

Burson v. *Freeman*, 504 U.S. 191 (1992); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Subsection (3) withstands the test.

As discussed above, subsection (3) furthers a compelling state interest in ensuring the safe access of its citizens to health care facilities so that they can obtain medical care and counseling. That interest is of paramount importance because safe access is central to the health and well-being of the State's citizens. Subsection (3) also furthers the necessarily-included state interest in safe access of a particular group of persons to a particular type of health care, *i.e.*, "protecting a woman's freedom to seek pregnancy-related services." *Schenck*, 519 U.S. at 376.

The statute accomplishes those objectives without burdening any more speech than necessary. The Colorado statute is narrowly tailored to serve the compelling state interests at stake. In *Burson* v. *Freeman*, this Court upheld a plainly content-based ban on campaigning (including the display or distribution of written campaign materials) within 100 feet of election polls as justified by the governmental interests in preventing voter intimidation and fraud. 504 U.S. at 211 (plurality opinion); *id.* at 216 (opinion of Scalia, J., concurring in the judgment). That ban was far broader than the restriction at issue here, which only limits to eight feet the distance within which a person can approach another person, without consent, for purposes of communication within 100 feet of the entrance to a health care facility. Unlike the 100-foot campaigning-free zone imposed in *Burson*, the eight-foot distance imposed here does not create any speech-free zone and, even where the limitation on approaches applies, it still

permits the communication to be heard and seen by the intended audience.[6]

CONCLUSION

The judgment of the Supreme Court of Colorado should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
DAVID K. FLYNN
LOUIS E. PERAERTZ
Attorneys

DECEMBER 1999

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[6] The Court should reject petitioners' contention (Br. 27-31) that the statute is a prior restraint because it "subjects * * * speech to the permission of a person deputized by the state," *id.* at 27-28, and petitioners' argument (Br. 45-50) that subsection (3) is unconstitutionally vague, for reasons similar to those on which it relied in *Madsen*, 512 U.S. at 763-764 n.2 (prior restraint); *id.* at 775-776 (vagueness), and *Schenck*, 519 U.S. at 374 n.6 (prior restraint), *id.* at 383 (vagueness). Petitioners also argue (Br. 22-27) that subsection (3) is unconstitutionally "overbroad," in the sense that it is "a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." Br. 24 n.17. For the reasons discussed above, subsection (3) is not such a statute.

APPENDIX

Section 18-9-122 of the Colorado Revised Statutes provides:

18-9-122. Preventing passage to and from a health care facility - engaging in prohibited activities near facility. (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

(5)

No. 98-1856

Supreme Court, U.S.
FILED
NOV 12 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LEILA JEANNE HILL, *et al.*,

Petitioners,

—v.—

STATE OF COLORADO, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF COLORADO

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

Steven R. Shapiro
(*Counsel of Record*)
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has vigorously defended the right to free speech on the public streets, and has appeared before this Court on numerous occasions in support of that principle, from *Hague v. CIO*, 307 U.S. 496 (1939), to *Buckley v. American Constitutional Law Foundation*, 525 U.S. __, 119 S.Ct. 636 (1999).

At the same time, the ACLU has long been committed to preserving a woman's right to reproductive choice. The ACLU has therefore participated in every major reproductive health care case decided by this Court over the past forty years, beginning with *Poe v. Ullman*, 367 U.S. 497 (1961), and extending through *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. We have also consistently argued in this context and in others that constitutional rights can quickly become meaningless if they cannot be exercised without running a gauntlet of violence, intimidation and harassment. Accordingly, the ACLU supported passage of the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. §248. Likewise, we agreed with this Court's view in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), that specific clinic protestors who had engaged in prior unlawful conduct could be subject to a narrowly crafted injunction imposing reasonable

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

time, place, and manner restrictions on their demonstration activity.

Based on this experience, the ACLU deeply believes that the volatile issue of abortion clinic protest must not be resolved by sacrificing either the right to reproductive choice or the right to engage in peaceful political protest. Rather, the burden in each case is to arrive at a solution that accommodates both rights, and that does so in a principled way that is consistent with our constitutional tradition. This case once again poses the question of how that should be done. Its proper resolution is thus a matter of substantial interest to the ACLU and its members.

STATEMENT OF THE CASE

In 1993. Colorado's General Assembly enacted a statute designed to regulate protest activity outside "health care facilities" within the state.[2] The critical provision now before the Court establishes an eight-foot floating buffer zone or bubble that surrounds people walking within one hundred feet of the entrance to a health care facility.[3] Anyone who "knowingly aproaches" closer than eight feet to someone within the designated area without consent is subject to both civil and criminal penalties if, but only if, the purpose of the person approaching is to hand out a leaflet, display a sign,

[2] The full text of the statute, C.R.S. §18-9-122, is set forth at Pet.App. 64a-65a. Although this case has focused exclusively on abortion clinic protests, the actual scope of the statute is not so limited. Specifically, the term "health care facility" is broadly defined to include "any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment . . ." §18-9-122(4).

[3] The statute explicitly states that it is intended to regulate protest activity "in the public way or sidewalk area." §18-9-122(3).

or engage in "oral protest, education, or counseling." C.R.S. §18-9-122(3).

The Colorado Supreme Court has authoritatively construed this language to mean that "the statute is not violated if [protestors] stand still while inside the floating buffer zone," Pet.App. 21a, even if their static position on the street may occasionally bring them closer than eight feet to clinic patients and staff. Whether standing or moving, however, anyone who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility," §18-9-122(2), is subject to civil and criminal penalties under a second provision of the law, which was not challenged in this litigation.

The preamble to the statute makes clear that, in drawing these lines, the Colorado legislature was attempting to balance "the right to protest or counsel against certain medical procedures" against the "right to obtain medical counseling and treatment in an unobstructed manner." §18-9-122(1). As the preamble also makes clear, the legislature's overriding goal in seeking to achieve this balance was to "prevent[] the willful obstruction of a person's access to medical counseling and treatment at a health care facility." *Id.*

The statutory concern with "willful obstruction" reflected legislative testimony that the Colorado Supreme Court characterized as "compelling." Pet.App. 9a. One particular nurse practitioner whose testimony was cited by the majority below described how anti-abortion protestors "yell, thrust signs in faces, and generally try to upset the patient as much as possible, which makes it much more difficult for us to provide care . . ." *Id.* at 8a. Another witness testified how a mother and daughter were "immediately surrounded" by screaming protestorsas they tried to walk from their car to the clinic entrance. *Id.* at 9a.

At the same time, it is apparent from even the excerpted legislative record contained in the opinion below that at least some of legislative testimony was addressed to the content of the protestors' message as much as it was to the manner in which that message was delivered. For example, the Colorado Supreme Court quotes one legislative witness who stated, in part: "[The protestors] are flashing their bloody fetus signs. They are yelling, 'you are killing your baby.'" *Id.*

Petitioners, who describe themselves as "sidewalk counselors," brought suit soon after the statute went into effect complaining that its eight-foot floating buffer violated their First Amendment right to engage in peaceful protest on the public streets. Their request for declaratory and injunctive relief was initially denied by the Colorado courts.[4] This Court then granted *certiorari* and remanded the case for further consideration in light of the intervening decision in *Schenck*, 519 U.S. 357. On remand, the eight-foot floating buffer was again upheld by the Colorado courts.

First, the Colorado Supreme Court emphasized that this case involves review of a statute, not an injunction. Second, it relied on language in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 743 (1994), for the proposition that content-neutral statutes regulating speech are entitled to a more deferential review than content-neutral injunctions regulating speech. Third, applying intermediate scrutiny, it ruled that the Colorado law represents a narrowly tailored response to the state's significant interest in safeguarding health that leaves protestors with ample alternative channels for communication. *See* Pet.App. 1a-29a.

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[4] The trial court's 1994 decision granting the state's motion for summary judgment, Pet.App. 30a-37a, was upheld by the Colorado Court of Appeals, *id.* at 38a-45a. The Colorado Supreme Court denied discretionary review in the first round of appeals. *Id.* at 46a.

SUMMARY OF ARGUMENT

As this Court has repeatedly held, the public streets are a "quintessential public forum for expressive activity." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also United States v. Grace*, 461 U.S. 171, 177 (1983). Indeed, long before the public forum doctrine even developed as an analytic tool in First Amendment cases, this Court famously observed that public streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. at 515.

Thus, this Court has always reacted with skepticism to restrictions on speech that require the speaker to seek prior permission from the audience in a public forum where anyone who does not want to hear the speaker's message is free to walk away. *See Cohen v. California*, 403 U.S. 15, 21 (1971)("we are often 'captives' outside the sanctuary of the home and subject to free speech"), quoting *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970). Similarly, this Court has made clear in the so-called "heckler's veto" cases that the hostile reaction of the crowd is generally not a constitutionally adequate reason to silence the speaker in a public forum. *E.g., Edwards v. South Carolina*, 372 U.S. 229 (1963).

Those cases provide an instructive but not exact analogy to the present controversy. The state's interest in this case is not in acquiescing to the hostile reaction of clinic patients and staff, either because the state shares the ideological views of the clinic patients and staff or because it fears the clinic patients and staff will erupt into violence when confronted with an unwanted message. Rather, the state's asserted interest, at least as expressed in the preamble to the

challenged statute, is to preserve the health and safety of women seeking medical treatment in a "health care facility."

That interest is undoubtedly a significant one. But the legitimacy of the state's interest cannot and does not justify whatever means the state may choose to enforce that interest. When First Amendment rights are at stake, "[p]recision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963). For that reason, the Court in *Madsen* struck down a portion of the injunction that barred the named defendants and those acting in concert with them from approaching any clinic patient within a three hundred-foot radius of the clinic entrance without permission. Although recognizing the state's interest in protecting patients who were being "stalked" or "shadowed," the Court concluded that the injunction as written was needlessly overbroad. 512 U.S. at 773-74. Likewise, in *Schenck*, the Court ruled that a fifteen-foot floating buffer could not be sustained as part of the injunction in that case. 519 U.S. at 377-80.

To be sure, there are differences between the floating buffer in this case and the floating buffers in *Schenck* and *Madsen*. The floating buffer in *Madsen* extended three hundred feet from the clinic entrance; here, it extends only one hundred feet. Similarly, the floating buffer in *Schenck* created a fifteen-foot bubble around anyone entering or leaving the clinic; here, the bubble is only eight feet wide. The Colorado statute also contains a scienter requirement -- *i.e.*, it only applies to protestors who "knowingly approach" clinic patients and staff -- that helps to ameliorate the problem of uncertain boundaries that so troubled the *Schenck* Court. *See also Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). Thus here, unlike *Schenck*, protestors who stand still while delivering their message cannot be forced to back off whenever anyone within eight feet objects to their presence.

These distinctions do make some difference. But, they do not resolve the fundamental flaw of the Colorado statute. Like the invalidated provisions in *Schenck* and *Madsen*, it makes even traditional First Amendment advocacy on the public streets a matter of grace rather than right. In the final analysis, therefore, this case is controlled by the parallel holdings in *Schenck* and *Madsen*. Contrary to the opinion of the court below, the fact that *Schenck* and *Madsen* involved review of an injunction rather than a statute is not enough to save the Colorado law for at least three reasons.

First, unlike the comparable provisions in *Schenck* and *Madsen*, the floating buffer zone created by the Colorado law cannot be described as content-neutral. On this issue, the fact that Colorado proceeded by statute rather than by injunction works against the state rather than in its favor. In both *Schenck* and *Madsen*, this Court emphasized that the challenged injunctions were directed against particular defendants because of their prior misconduct and did not depend in any way on the content of their future speech. Here, by contrast, the floating buffer is generally applicable to everyone who seeks to engage in "oral protest, education or counseling," regardless of whether they have previously engaged in past misconduct. Conversely, the floating buffer can be penetrated with impunity by someone who is merely seeking directions to the closest bus stop, for example. Especially when read in conjunction with the statute's general ban on obstructing or hindering entry to or exit from an abortion clinic, the conclusion seems inescapable that the focus on "oral protest, education or counseling" distinguishes among speakers based on what they are saying and not on what they are doing. Such distinctions are plainly content-based and trigger strict scrutiny, a standard that no one has argued this statute can meet.

Second, even if Colorado's floating buffer is described as content-neutral, the lower court placed far too much weight on the difference between injunctions and statutes. It is, of course, true that *Madsen* holds that a content-neutral injunction can burden no more speech than necessary to accomplish a significant government interest while a content-neutral statute cannot burden substantially more speech than necessary. Whether this two-tiered standard of review ultimately makes sense is itself an important question that has already generated a great deal of commentary both inside and outside the Court. However, it is not dispositive in this case. Intermediate scrutiny under the First Amendment was never intended to be a toothless standard. And, in applying intermediate scrutiny, one cannot answer the question of whether the state has burdened substantially more speech than necessary without also examining the legitimate scope of the state's regulatory interest.

Only by asking what the state is trying to accomplish can one understand whether the state has gone too far. The standard of review inevitably affects that inquiry but it does not resolve it. As *Madsen* itself illustrates, a thirty-six foot buffer zone may be an appropriate injunctive response to the misbehavior of particular defendants at a specified site. But it does not follow that a statutory buffer zone of thirty-six feet is therefore automatically valid even though it would be assessed on the basis of a lower standard of review. Regardless of which standard is invoked, a court cannot avoid the essential task of weighing the relationship between means and end. Moreover, in undertaking that task, a reviewing court must consider the possibility that a statutorily imposed buffer burdens substantially more speech than necessary precisely because its proscriptions apply to individuals who may never have engaged in prior unlawful behavior. The court below failed to grasp this critical point and, accordingly, misapplied the intermediate scrutiny standard.

Third, the Colorado law cannot survive intermediate scrutiny if properly applied. There is no doubt that the state has a significant government interest in ensuring that women (and men) have unimpeded access to health care facilities. Indeed, the ACLU has vigorously advocated in favor of that interest on numerous occasions in both the legislative and judicial arenas. The portion of Colorado's law ensuring unimpeded access to health care facilities, however, has not been challenged in this case. The floating buffer obviously has some relationship to the same underlying interest. But, it also goes further by penalizing advocacy within eight feet that does not threaten to impede or obstruct persons entering or leaving the clinic, including the simple act of handing out a leaflet.

Colorado undoubtedly felt that a prophylactic rule -- which is what the floating buffer represents -- would be easier to enforce and thus provide an added layer of protection against those who might abuse their First Amendment rights. As this Court has repeatedly admonished, however, "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. at 458. What was true in *Madsen* is therefore equally true here: the fact that some protestors might cross the line from protected advocacy to unprotected harassment and intimidation does not "justify a prohibition on *all* uninvited approaches . . . ." 512 U.S. at 774 (emphasis in original).

ARGUMENT

I. COLORADO'S FLOATING BUFFER ZONE IS, AT LEAST IN PART, A CONTENT-BASED RESTRICTION ON SPEECH

In order to apply intermediate scrutiny and thus distinguish this case from *Schenck* and *Madsen*, both of which struck down floating buffer zones, the Colorado Supreme Court was first obliged to hold that Colorado's floating

buffer is content-neutral. Unfortunately, that first step was also a misstep.

To begin with, the language of the statute expressly distinguishes between lawful and unlawful conduct based on the content of speech. A statute that created an eight-foot bubble around clinic patients and staff that could not be invaded without consent by any person for any purpose within one hundred feet of the clinic entrance would be content-neutral, even though it would undoubtedly be subject to other constitutional attacks. *See* Point III, *infra*. That is not the statute that Colorado has enacted, however. Instead, the penalty provisions of Colorado's law are only triggered if a person "knowingly approaches" for one of three prohibited purposes: (1) passing a leaflet or handbill; (2) displaying a sign; (3) engaging in "oral protest, education or counseling." Pet.App. 65a.

Even if the first two purposes could be described as content-neutral, the ban on "oral protest, education or counseling" within eight feet clearly turns on the content of what is being said. The Colorado Supreme Court's assertion that "the statutory language makes no reference to the content of the speech," *id.* at 22a, is both inexplicable and plainly wrong.[5] It is only by evaluating the content of speech that a factfinder can determine, for example, whether a labor picketer has entered the eight-foot floating buffer to ask for the time or urge support for a hospital strike. The same is true for an animal rights activist who might "knowingly approach" research staff at a health care facility to protest animal experimentation or to engage a neighborhood acquaintance in social conversation.

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[5] The opinion below also asserts that petitioners waived any claim that the statute is content-based. *Amicus* has no views on the merits of that dispute other than to note that petitioners contend otherwise. Pet. Reply Br. at 4.

Although the Colorado statute is not written in terms of a specific subject, like abortion, the limit it places on protest, education and counseling outside a health care facility undeniably describes a "category of speech," *Boos v. Barry*, 485 U.S. 312, 319 (1988). Furthermore, it is a "category of speech" that has clear subject matter consequences in the context of this statute, as described above.

The inescapable need to refer to content in applying the Colorado statute distinguishes this case from *Schenck* and *Madsen*. In both *Schenck* and *Madsen*, the injunctions had nothing directly to do with the content of speech and everything to do with the past misbehavior of the defendants. Correspondingly, the defendants in *Schenck* and *Madsen* did not expose themselves to sanctions because of what they said but only because of what they did.

As this Court explained in *Madsen*:

> [The trial court] imposed restrictions on [defendants] incidental to their antiabortion message because they repeatedly violated the court's original order. That [defendants] all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

512 U.S. at 763 (emphasis in original).

The same cannot be said of Colorado's law. Because Colorado chose to proceed by statute, the law's coverage is not confined to those who have previously misbehaved. And because Colorado chose to make the eight-foot bubble impenetrable without consent only to those who engage in "oral protest, education or counseling," it is impossible to say that the challenged provision was enacted "without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

In reaching this conclusion, we have no reason to doubt Colorado's good faith or its genuine concern with the physical well-being of clinic patients and staff. As the Colorado Supreme Court pointed out, *see* p.3, *supra*, the legislative record contains disturbing accounts of harassment and intimidation by some antiabortion protestors. Those activities, however, are already illegal under Colorado law.[6] In addition, an unchallenged portion of this statute creates new criminal penalties for anyone who obstructs, hinders, or impedes movement into or out of a health care facility. Pet. App. 65a.[7]

Under these circumstances, there are two plausible explanations for the eight-foot floating buffer. One is that it simplifies enforcement by relieving the state of the burden of proving obstruction or hindrance. The constitutional difficulties with this prophylactic approach in a First Amendment context will be discussed more fully below. *See* Point III, *infra*. The other possibility is that the state is trying to shield clinic patients and staff from having to confront at close range the protestors' message and the anxiety it may

[6] *See, e.g.*, C.R.S. §18-9-111 (making it a crime to follow a person in or about a public place "with intent to harass, annoy or alarm").

[7] Interestingly, the provisions of C.R.S. §18-9-122(2) are not limited by the one hundred-foot boundary that applies to the floating buffer zone.

cause. For patients, in particular, that anxiety may have real world consequences, such as heightened blood pressure, that can complicate the medical treatment they are hoping to obtain. Still, it is impossible to avoid the hard choices that the Constitution requires by mislabeling Colorado's law as content-neutral. As Justice O'Connor said in *Boos*, 485 U.S. at 312, and as this Court recently reiterated in *Reno v. ACLU*, 521 U.S. 844, 868 (1997), a listener's reaction to the content of speech is a "primary" rather than a "secondary effect." *Compare Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

Content-based restrictions on speech in a public forum are subject to "the most exacting scrutiny." *Boos*, 485 U.S. at 321. For present purposes, it is sufficient to note that neither the state nor the lower courts in this case have even claimed that the statute could survive such scrutiny. This Court's decisions in *Schenck* and *Madsen* plainly indicate otherwise.

II. THE DECISION BELOW MISAPPLIES THE DISTINCTION BETWEEN INJUNCTIONS AND STATUTES ARTICULATED IN *MADSEN*

Twice within the past five years, this Court has been asked to consider the constitutionality of floating buffer zones that restricted protest activity outside abortion clinics. Both times, the Court invalidated the challenged provision. According to the Colorado Supreme Court, those cases are distinguishable because they involved court-ordered injunctions rather than statutes. While that distinction has been a factor in this Court's analysis, it does not support the different result reached by the court below.

In *Schenck*, this Court struck down a fifteen-foot floating buffer zone that surrounded people entering or leaving plaintiffs' health care facilities. 519 U.S. at 377-80. The

one exception was for two "sidewalk counselors" who were allowed inside the fifteen-foot bubble but even they were required to "cease and desist" if the person they were targeting objected. Writing for the majority, Chief Justice Rehnquist concluded that the imprecise boundaries of the floating buffer in *Schenck* made it constitutionally invalid. "[I]t would be quite difficult," he wrote, "for a protestor who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction." *Id.* at 378 (footnote omitted).[8]

In *Madsen*, the Court also struck down a floating buffer zone that enjoined defendants from approaching any clinic patient within three hundred feet of the clinic entrance without that person's consent. 512 U.S. at 773-74. If anything, the *Madsen* injunction was even less precise than the *Schenck* injunction. Not only did it float -- moving as the patient moved -- but it failed to inform defendants of how close they could be to a patient within the three hundred-foot area without violating the proscription against "physically approaching." *Id.* at 760. Nevertheless, the *Madsen* Court did not rest its holding on vagueness grounds. Instead, the Court broadly declared that "[t]he 'consent' requirement alone invalidates this provision." *Id.* at 774.

The Colorado Supreme Court decision does not even mention this aspect of *Madsen*, although it would seem to bear directly on the constitutionality of the challenged provision in this case, which also contains a consent requirement for even peaceful advocacy in a public forum. Rather, the Colorado Supreme Court focused exclusively on the floating buffer in *Schenck*, perhaps because it was hearing the case on remand from this Court "for further consideration in light of *Schenck*." Pet.App. 48a.

The court below began its discussion of *Schenck* with an acknowledgement of the "factual similarities" between that case and this one. Pet.App. 18a.[9] However, it quickly dismissed the significance of those similarities by noting that content-neutral injunctions and content-neutral statutes are subject to different standards of review after *Madsen*. Relying on that difference, the Colorado Supreme Court then applied what it regarded as the more lenient standard of review applicable to legislative enactments to uphold the floating buffer in this case.

It is undisputed, of course, that *Madsen* created a two-tier standard of review under which even content-neutral injunctions can only be sustained if they burden no more speech than necessary to achieve a significant government

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[8] The ACLU submitted an *amicus* brief in *Schenck* urging the Court to affirm the fifteen-foot fixed buffer zone based on the record developed in that case. Brief of the American Civil Liberties Union, *et al.*, in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065. The brief did not address the floating buffer zone except to note that it had been remanded by the Second Circuit to the district court for a further elaboration of its precise contours. *Id.* at 23 n.20.

[9] As previously noted, the Colorado Supreme Court also identified important dissimilarities between the floating buffer in *Schenck* and the floating buffer in this case. Most significantly, the court stressed that the addition of a scienter requirement in the Colorado law substantially diminishes the vagueness and enforceability concerns that figured so prominently in *Schenck*. Pet.App. 27a-28a. *See also Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). We agree that the "knowingly approach" language in the Colorado law makes this statute easier to enforce and understand. *Cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). For example, it means that protestors who have stationed themselves on the sidewalk do not have to constantly move as new people enter or leave the targeted facility. *Compare Schenck*, 519 U.S. at 378. Vagueness, however, is not the only concern, as *Madsen* makes clear. Even unambiguous statutes can be substantially overbroad. *See, e.g., Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

interest, while content-neutral statutes can be sustained so long as they do not burden substantially more speech than necessary to achieve a significant government interest. 512 U.S. at 764-68. But, contrary to the approach adopted below, the standard for evaluating statutory restraints on speech was never intended to be toothless. The question of whether a statute burdens more speech than necessary cannot be answered in a vacuum; it inevitably turns on the nature of the interest the state is seeking to promote. And, while the state is entitled to deference in defining those interests, courts cannot avoid the responsibility (even under intermediate scrutiny) of deciding whether the state has chosen a constitutionally appropriate means of achieving its stated ends.

The Colorado Supreme Court failed to conduct that inquiry in any meaningful way. The essential core of its holding that Colorado's floating buffer does not burden substantially more speech than necessary is contained in the following passage:

> Petitioners contend that section 18-9-122(3) is not narrow because, although the General Assembly declared its intent to curtail threatening conduct, it only prohibits protected speech. We disagree. The plain language of the statute indicates that it regulates speech and the conduct of "passing a leaflet or handbill," and displaying a sign.

Pet.App. 24a.

It is not at all clear what this passage signifies. The fact that the statute regulates expressive activities like passing a leaflet or displaying a sign says nothing about whether the statute burdens substantially more speech than necessary to accomplish its declared goals. The fact that passing a

leaflet and displaying a sign combine elements of speech and conduct in a single activity says nothing about whether this statute is narrowly tailored "to curtail threatening conduct." And the fact that the statute may not "only prohibit[] protected speech" says nothing about whether it prohibits too much protected speech. In short, what is entirely missing is any discussion of how the statute's ends and means relate to one another.

The most plausible explanation for this curious omission is the unspoken assumption that the fit between means and ends is somehow less important when reviewing a statutory restraint on speech. Nothing in *Madsen* supports that conclusion. Indeed, the fallacy becomes most apparent if one thinks about the thirty-six foot fixed buffer zone in *Madsen*. That fixed buffer was upheld even under the more stringent injunction standard because the record demonstrated that it was no broader than necessary to restrain particular defendants who had engaged in documented misconduct at a particular geographic site. It simply does not follow, however, that any thirty-six foot buffer zone enacted by statute is now constitutionally invulnerable because it will be subject to less stringent review. To the contrary, it is entirely possible that a statutory buffer zone of even less than thirty-six feet could be struck down as a violation of the First Amendment depending upon the reasons for its enactment and its impact on speech. *Madsen*, 512 U.S. at 778 (Stevens, J., concurring in part and dissenting in part). Different questions may need to be asked when reviewing a statute rather than an injunction, but the articulation of a lower standard merely starts the discussion; it does not end it, as the Colorado Supreme Court erroneously assumed.

More generally, the issue of whether a lower standard of review should be applied to statutory restraints on speech is an interesting and important one that may need to be reexamined in a future case. As the majority pointed out in

Madsen, the general applicability of a content-neutral statute offers some assurance that it is not targeted against disfavored groups. 512 U.S. at 764. On the other hand, even facially neutral statutes may be discriminatorily applied, and experience shows that the facially neutral language of a statute may nonetheless mask a discriminatory intent. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Likewise, while it is true that someone accused of violating an injunction is subject to contempt proceedings rather than the full due process safeguards of a criminal trial, *see Walker v. Birmingham*, 388 U.S. 307 (1967), it is also true that a judge issuing an injunction is bound by due process constraints that do not apply to the political process. Finally, the reach of an injunction is generally limited to past violations of the law, while a statute that does impose restraints on speech reaches "the community at large," *Teachers v. Hudson*, 475 U.S. 292, 309-10 n.22 (1986), and thus its burdens are more widespread.

These competing considerations create a complex calculus but it is not one that needs to be unraveled here. Measured against its stated objectives, Colorado's floating buffer cannot survive even intermediate scrutiny.

III. COLORADO'S FLOATING BUFFER BURDENS SUBSTANTIALLY MORE SPEECH THAN NECESSARY AND THUS CANNOT SURVIVE EVEN INTERMEDIATE SCRUTINY

To survive intermediate scrutiny under this Court's current test, a statute regulating speech must be content-neutral, it must be narrowly tailored to advance a significant government interest, and it must leave open ample alternative avenues of communication. *See, e.g., Clark v. Community for Creative Non-Violence* (*CCNV*), 468 U.S. 288, 293 (1984).

As noted above, we do not believe that the challenged provision in this case is, in fact, content-neutral. Even assuming the statute is content-neutral, however, it is plainly not narrowly tailored. Accordingly, it is unnecessary to decide whether petitioners have been left with other, adequate opportunities for expression.

The narrow tailoring requirement of intermediate scrutiny does not require the state to pursue its goals through the least restrictive alternative. On the other hand, a statute that "burden[s] substantially more speech than is necessary to further the government's legitimate interests" is not narrowly tailored. *Ward v. Rock Against Racism*, 491 U.S. at 799.

In this case, the state's purposes are openly declared in the preamble to the statute. It states, in its entirety:

> The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of [Colorado]; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

Pet.App. 64a-65a.

Subsection (2) of the statute, which has not been challenged in this litigation, is directly responsive to those concerns. Under its terms, any person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility" is subject to criminal prosecution. *Id.* at 65a.

By contrast, the floating buffer zone created by subsection (3) of the statute makes no reference to physical obstruction. Nor can it easily be construed as limited to physical obstruction without making its coverage completely redundant of the preceding section in violation of the traditional rules of statutory interpretation. *Gustaffson v. Alloyd Co.*, 513 U.S. 561, 574 (1995).[10]

As written, therefore, the floating buffer zone prohibits even peaceful protest activity within the designated area -- whether that activity takes the form of leafletting or oral advocacy -- unless the subject of that advocacy first grants her consent. Of course, an eight-foot buffer zone is not the same as a total ban. Patients and staff approaching the

[10] In contrast to Colorado's consent requirement, some floating buffers have incorporated a "cease and desist" provision that requires the protestor to back off once the listener expresses an unambiguous desire to be left alone. As Chief Justice Rehnquist observed in *Schenck*, there is no general right "to be left alone" on a public street. 519 U.S. at 383. Unlike a consent requirement, however, a cease and desist provision can far more easily be interpreted as the functional equivalent of a harassment statute and thereby designed to ensure what Justice Harlan assumed as a predicate for the Court's First Amendment holding in *Cohen v. California*, 403 U.S. 15 -- namely, the ability to walk away from unwelcome speech in a public forum. *See* ACLU *amicus* brief in *Schenck*, n.8, *supra*, at 25-29. On the other hand, as *Schenck* recognized, 519 U.S. at 378, a cease and desist provision may increase the risk that one listener can effectively veto face-to-face communication with others inside the same floating bubble.

clinic entrance can still see protest signs and hear protest messages from eight feet away. Moreover, a protestor who stands still may wind up closer than eight feet to clinic patients and staff. But the fact that an eight-foot buffer zone falls short of a total ban does not mean that its impact on speech can or should be regarded as constitutionally negligible.

The right to engage in "interactive communication" on the public streets about political issues lies at the "core" of the First Amendment, *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Such interaction is undeniably complicated when the state insists that a speaker and listener stay a certain distance apart. At an even more basic level, it is impossible to hand a leaflet to someone who is standing eight feet away.

We realize that the concept of "interactive communication" may seem strained in this context since it ordinarily presumes a willing speaker and a willing listener. The protections of the First Amendment, however, are not limited to speech between like-minded people. *See Thornhill v. Alabama*, 310 U.S. 88 (1940)(protecting labor picketers). If the message is unwelcome, as it often will be outside abortion clinics, the constitutionally appropriate response in a public forum is for the listener to walk away -- with adequate protection against being obstructed or hindered, as subsection (2) of the Colorado statute provides -- and not to enlist the power of the state to silence the speaker. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Cohen v. California*, 403 U.S. at 21.

We appreciate the state's understandable concern, based on numerous incidents that have occurred outside abortion clinics around the country, that some protestors may cross the line from peaceful advocacy to physical obstruction and potentially other forms of unlawful behavior if permitted to

approach clinic patients and staff without their consent. The floating buffer zone, however, represents both an under- and over-inclusive response to that problem.

First, §18-9-122 already deals with obstruction in another section. Second, the floating buffer zone does not actually prevent a protestor from getting much closer than eight feet to a patient or staff member so long as the protestor is not moving or does not engage in any of the expressive activities described in the statute. Third, and most significantly, the First Amendment does not permit the state to restrict the free speech rights of *all* protestors because *some* protestors may take advantage of the situation to violate the law. *Madsen*, 512 U.S. at 774.

The unconstitutional breadth of Colorado's floating buffer is clear when the statute is compared to other time, place, and manner restrictions that this Court has considered. For example, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the Court upheld a Los Angeles ordinance that prohibited the posting of signs on public property, but only after concluding that the ordinance "responds precisely to the substantive problem [of visual blight] that concerns the City." The same cannot be said of Colorado's floating buffer, which far more closely resembles the anti-littering law struck down in *Schneider v. State*, 308 U.S. 147 (1939). There, as here, the state "could have addressed the substantive evil without prohibiting expressive activity," or adopting a "prophylactic rule." *Vincent*, 466 U.S. at 810.

Similarly, in *United States v. Grace*, 461 U.S. 171, the Court refused to uphold a statutory ban on certain expressive activity on the Supreme Court grounds. In rejecting the government's defense of the statute as a time, place, or manner regulation, Justice White explained that the statute was constitutionally invalid because it had "an insufficient

nexus with any of the public interests that may be thought to undergird [it]." *Id.* at 181. Like Colorado's floating buffer, the purpose of the challenged statute in *Grace* was to protect the security of the Supreme Court building and the safety of its personnel. The legitimacy of that interest was never questioned. Nevertheless, the Court noted that "[t]here is no suggestion . . . that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." *Id.* at 182. Colorado's statute suffers from precisely the same flaw by converting even nonthreatening comments and silent leafletting on the public streets into a criminal offense.

Finally, the holdings in *Ward* and *CCNV* also assume a fit between means and ends that is lacking here. Thus, in *Ward*, an ordinance requiring that New York City employees operate any sound amplification equipment used for bandshell concerts in Central Park was upheld because it directly advanced the city's interest in controlling noise levels in midtown Manhattan. 491 U.S. at 800. Likewise, in *CCNV*, a federal regulation that barred political protestors from sleeping in Lafayette Park was upheld because, in the Court's view, it "narrowly focuse[d] on the Government's substantial interest in maintaining the parks in the heart of our Capitol in an attractive and intact condition." 468 U.S. at 296.

The underlying theme in all these cases is that a state must craft its statutes narrowly when regulating speech, and the interests it seeks to advance must be unrelated to the suppression of expression. *See United States v. O'Brien*, 391 U.S. 367 (1968). Colorado has identified its interest as access to health care facilities for patients and staff. Unfortunately, the floating buffer is not narrowly tailored to promote that interest. Instead, it focuses directly on expressive

activities. It thus burdens substantially more speech than necessary to accomplish the state's goal and cannot be sustained, even under intermediate scrutiny.

CONCLUSION

For the reasons stated herein, the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

Steven R. Shapiro
(*Counsel of Record*)
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Dated: November 12, 1999

FILED
NOV 12 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(6)

No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,
Petitioners,

V.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, ET AL.,
Respondents.

On Writ of Certiorari to the Colorado Supreme Court

AMICUS BRIEF OF LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

Mathew D. Staver
Florida Bar No. 0701092
(Counsel of Record)
Erik Stanley
Florida Bar No. 0183504
LIBERTY COUNSEL
1900 Summit Tower Boulevard
Suite 540
Orlando, Florida 32810
(407) 875-2100

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INTEREST OF AMICI[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization dedicated to protect freedom of speech. Liberty Counsel's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms -- especially as related to use of traditional public fora for discussion of controversies impacting society. As part of advancing Liberty Counsel's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, filing *amicus curiae* briefs, and litigation.

Liberty Counsel is interested in protecting the First Amendment Free Speech rights of individuals engaged in peaceful, lawful speech and assembly in front of and near abortion clinics. Liberty Counsel is also interested in ensuring that women considering abortion have the opportunity to receive all information relevant to making an informed choice regarding abortion.

Liberty Counsel files this brief in support of the Petitioners with the aim to assist this Court in rendering a reasoned decision. Attorney Mathew D. Staver was lead counsel in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 743 (1994), and having argued that case before this Court, and having written an *Amicus* brief in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), herein attempts to lend his assistance in the proper application to this case.

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[1] This brief is filed with permission of all the parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The consent provisions in the statute are unconstitutional content and viewpoint-based restrictions. This Court struck down a similar consent requirement in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 743 (1994). The *Madsen* court applied a heightened level of scrutiny in the context of a content-neutral injunction, stating that said injunction when imposed upon individuals with unlawful past histories may burden no more speech than necessary to serve the governmental interest. This test was developed from previous Court precedent when considering content-neutral regulations on individuals with a pristine past. Indeed, the *Madsen* test when applied against individuals with an illegal past history is similar to a content-neutral statute when applied to individuals with no illegal past history. The consent requirements therefore burden more speech than necessary.

The consent provisions are, however, content-based and thus unconstitutional. The government may not grant the use of a forum to people whose views it finds acceptable but deny the same forum to views it finds less favorable. The consent requirement is content-based since it is applied only in the context of those favorable to the Clinic invoking the statute with reference to those opposed to the Clinic.

The statute is also viewpoint-based in that it allows speech favoring abortion by those who are accessing the Clinic but prohibits speech disfavorable of abortion by those opposed to the Clinic. Thus, abortion is a permitted category of speech, but pro-life speech is banned while pro-choice speech is favored.

The consent requirement is also an unconstitutional prior restraint. The statute vests the power in private citizens to restrain speech before it occurs.

The statute is not a reasonable time, place and manner restriction. The statute is not narrowly tailored. This Court stated in *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), that a

content-neutral injunction burdens more speech than necessary when it bans handbilling in that such restriction would suppress a great quantity of speech that does not cause the evil the statute seeks to eliminate. The Colorado statute burdens more speech than necessary in that it prohibits handbilling within the eight-foot floating bubble zones.

The floating bubble zones are unconstitutional under this Court's decision in *Schenck v. Pro-choice Network of Western New York*, 519 U.S. 357 (1997). This Court found that a floating eight-foot bubble zone burdened more speech than necessary because it would prohibit, among other things, leafletting.

The statute is also unconstitutional because it is both overbroad and vague. It is overbroad in that it prohibits handbilling and it is vague because the bubble zones float and require petitioners to steer far wider of the unlawful zone.

The statute is also unconstitutional because it violates Petitioners' right to free association.

ARGUMENT

I.

THE CONSENT PROVISIONS ARE UNCONSTITUTIONAL CONTENT AND VIEWPOINT RESTRICTIONS.

The founding fathers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ." *Whitney v. California*, 274 U.S. 357, 374-75 (1929) (Brandeis, J., concurring). Such reverence for free speech is nowhere more important than in quintessential public fora which from time immemorial have been open for public debate. *See Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *ISKCON v. Lee*, 505 U.S. 672, 694 (1992)(Kennedy, J., concurring); *Perry Education Ass'n. v. Perry Local Educators'*

Association, 460 U.S. 37, 45 (1983).

"A state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell v. Connecticut*, 310 U.S. 900, 905 (1940). This Court laid out the principle for this proposition in *New York Times Co. v. Sullivan*, 376 U.S. 254, 720-21 (1963):

> Those who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risk to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination. . . ."

The "consent" provision is legally indistinguishable from the 300-foot "no approach zone" in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The applicable portion of the Ordinance states as follows:

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of . . . counselling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

Hill v. Thomas, 973 P.2d 1246, 1248 (Colo. 1999)(en banc).

In *Madsen*, this Court struck down a provision which required prior consent before a pro-life person could approach any person seeking the services of the clinic. *Madsen*, 512 U.S. at 776. Within 300-feet of the clinic, a pro-life person could not distribute literature or even speak with any individual unless such person indicated a desire to communicate. *Id.* The applicable portion of the statute in *Madsen* prohibited pro-lifers "from physically approaching any person seeking the services of the Clinic unless

such person indicates a desire to communicate by approaching or by inquiring . . .". *Id.* at 760. This Court held that it could not "justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic; regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id* at 776.

This Court struck down the 300-foot "no approach zone" for the same reason it should now strike down the "consent" provision -- any other conclusion will result in the abolishment of the public forum doctrine. This Court in *Madsen* concluded as follows:

> "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id. at 774 (*quoting Boos v. Barry*, 485 U.S. 312, 322 (1988)).

Respondents may argue that the *Madsen* test, wherein this Court struck down a consent or no approach provision, applies only to injunctions and not to statutes. However, Respondents overlook two important points. First, the *Madsen* Court cited *Nat'l. Society of Professional Engrs. v. United States*, 435 U.S. 679, 697-98 (1978), which stands for "the proposition that an injunction may restrict what would normally be protected expressive activity when, in the context of that restriction, the violator is known to have repeatedly engaged in illegal conduct."[2] Thus, in the context of individuals who violated statutory or common law, and where there is a cognizable threat of repeated violations, said individuals under *Madsen* can lose certain First Amendment rights that would

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[2] Mathew D. Staver, *Injunctive Relief and the* Madsen *Test*, 14:2 ST. LEWIS U. PUB. L. REV. 465, 485 n.123 (1995).

otherwise be afforded to people with a pristine past. Even in the context of past violations, the *Madsen* test gave a heightened level of scrutiny indicating that an injunction imposed against past violators could not "burden more speech than necessary."

Therefore, a statute has to be analyzed with regard to the prior history of the individuals who are affected by the statute's reach. In this case, petitioners have a pristine past and do not carry the baggage of the petitioners in *Madsen*. This is a fundamental principle of constitutional law that cannot be overlooked. Additionally, the phrase "burdens no more speech than necessary to accomplish the governmental interest at stake" did not originate with *Madsen* and is not solely applicable to injunctions. Indeed, the concept that a regulation may burden no more speech than necessary to serve a significant government interest originated in the context of content-neutral regulations and not injunctions.[3] Indeed, in the same term that this Court decided *Madsen*, this Court stated that a content-neutral regulation may not "burden more speech than necessary." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994). Thus, the same principles that were applicable in *Madsen* utilizing the test that an injunction may "burden no more speech than necessary" when applied to people with a checkered past is essentially identical to a content-neutral statute when applied to a person with a pristine past. *Madsen* is directly applicable to this case and the principles enunciated in *Madsen* and from which *Madsen* drew its test serve to invalidate the Colorado statute.

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[3] *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 673 (1992)(O'Connor, J., concurring); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1039 (1991)(Rehnquist, J., dissenting); *United States v. Kokinda*, 497 U.S. 720, 757 (1990)(Brennan, J., dissenting); *Board of Trustees v. Fox*, 492 U.S. 469, 476-78 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989); *Frisby*, 487 U.S. at 491, 496 (Brennan, J., dissenting); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

The founding fathers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . Believing the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 374-75 (1929) (Brandeis, J., concurring). Reverence for free speech is nowhere more important than in quintessential public fora which from time immemorial have been open for public debate.

The speech here takes place in traditional public fora. *See Perry Educ. Ass'n*, 460 U.S. at 45; *Boos*, 485 U.S. at 318. The "captive audience" doctrine does not apply in traditional public fora. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975); *Cohen v. California*, 403 U.S. 15, 21 (1971). Any individual seeking ingress to or egress from the Clinic, as well as any pro-choice escort working for the Clinic, can roam freely without regard to any boundaries and censor pro-life speakers at will merely by approaching and whispering the word "stop." The statute clearly burdens more speech than necessary.

A.

The Consent Provision Is Content-Based.

The "consent" provision is much like the provisions struck down in *Madsen* which prohibited "intimidating" persons and limiting speech to a "conversation of a non-threatening nature." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 743, 775-76 (1994). *Madsen* also struck down a provision stating that once invited contact had been initiated, the person associated with the clinic could end the communication by stating such words as "stop," "withdraw," "back off," "get away," "leave me alone," or words or actions of similar import. *Id.* Like this case, in *Madsen*, when the desire to end the contact was made known, the pro-life speaker was required to immediately terminate the contact and leave the presence of the person protected by the injunction. *Id. See also United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d

422, 432 (8th Cir. 1988) (overturning ban on "persisting and talking to or communicating in any manner with" a person or persons "against his, her or their will").

In *Madsen*, the "invited contact" provision hinged on the emotive impact of the listener by using such words as "positive interest" and by providing that the listener affirmatively make the invitation to speak prior to the attempted contact. In other words, the pro-life speaker was not allowed to speak unless the listener gave an invitation to do so. Consequently, the pro-life speaker could only speak with the consent and invitation of the listener. This Court concluded that the "consent" requirement alone burdened "more speech than necessary" to prevent intimidation and to ensure access to the clinic. *Madsen*, 512 U.S. at 776.

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. **Absent evidence that the protestor's speech is independently proscribable (i.e., "fighting words," or "threats"), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand.** As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech, in order to provide adequate breathing space to the freedoms protected by the First Amendment.[4]

In this case, the lower court justified the statute by finding that protesters may cause stress to individuals entering and leaving the abortion Clinic. However, stress is merely the emotive impact or "listener reaction" caused by speech. "The emotive impact of

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[4] *Id.* at 774 (*quoting Boos v. Barry*, 485 U.S. 312, 322 (1988))(emphasis supplied)(citations and quotations omitted).

speech on its audience is not a 'secondary effect.'" *Boos*, 485 U.S. at 321. Intellectual and emotive impact of speech is the primary impact of speech. A regulation which regulates speech due to its primary impact is content-based and is subject to the "most exacting scrutiny." *Id.* A statute, where the predominant intent is to regulate the primary effects of speech, is content-based. *Id.*

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

Clearly the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more controversial views." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Content-based regulations simply cannot be tolerated. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 134 (1992); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). Stressing its disdain for content-based prohibitions, this Court stated that "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.'" *Mosley*, 408 U.S. at 95-96 (*quoting New York Times Co.*, 376 U.S. at 270).[5]

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[5] "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster*, 502 U.S. at 115. Content-based regulations of speech constitute "censorship in a most odious form" and clearly violate the first amendment. *Cox v. Louisiana*, 379 U.S. 536, 581

To be content-neutral, the "consent" provision must be "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984). In *Coates v. City of Cincinnati*, 402 U.S. 611, 612-14 (1971), this Court struck down an ordinance restricting speech if it was annoying to those passing by. If the First Amendment protects begging, *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993), critical picketing, *Thornhill v. Alabama*, 310 U.S. 88 (1940), in-person urging of a boycott outside a targeted business, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982), and verbal "harassment" and "interference" with hunters, *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988), it should also protect speech which some persons might find "objectionable". *Madsen*, 512 U.S. at 773.

"Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 505 U.S. at 133. This Court overturned a flag burning conviction because prosecution "depended on the likely communicative impact" of expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 411 (1989). Such restrictions are content-based. "The emotive impact of speech on its audience is not . . . unrelated to the content of the expression itself." *Boos*, 485 U.S. at 321.

Although protecting the "timid" might be a commendable avocation of some, asserting that the state has a duty to protect us from upsetting speech is contrary to this Court's long standing precedent. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)(*quoting FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)). "If there is a bedrock

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(1965) (Black, J., concurring). "Education is the proper and preferable alternative to censorship." *Whitney v. California*, 274 U.S. 357, 360 (1929).

principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. Stress induced by speech or other listener reaction caused by speech-related activity is not a legitimate basis for regulating activities protected by the First Amendment. *See Forsyth County*, 505 U.S. at 134; *Boos*, 485 U.S. at 321. Indeed, "coercive impact . . . does not remove [speech] from the reach of the First Amendment. . . . *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citations omitted).

B.

The Consent Provision Is Viewpoint-Based.

Not only is the "consent" provision content-based, it is also viewpoint-based. The statute not only regulates a broad class of speech (abortion speech), but further restricts a subclass of that speech (anti-abortion speech) "based on hostility -- or favoritism -- toward the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). The state "has no authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry Rules." *Id.* at 391. The statute allows speech favoring abortion rights because such would acceptable to the person seeking the services of the clinic. Thus, within the category of abortion speech, only speech favoring abortion is permitted while speech opposing abortion is damned.

Like the decretal portion of the *Madsen* injunction allowing "invited contact" only if the person sought to be contacted physically approaches and indicates "a positive interest" in what is being said, the "consent" provision gives license to one side of the abortion debate while squelching the other. *See Schacht v. United States*, 398 U.S. 58, 63 (1970) (statute "which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment"); *See also Texas v. Johnson*, 491 U.S. 397, 417 (1989). This differential treatment based upon viewpoint must be

viewed with *exacting scrutiny*. *See R.A.V.*, 505 U.S. at 384; *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 114 (1991); *Boos v. Barry*, 485 U.S. 312, 320-22 (1988). The government may not regulate speech "in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 804 (1984).

The pro-life speaker faces viewpoint censorship because if she is simply standing on the sidewalk with a picket sign and a pro-choice escort approaches her and says, "Stop," she must immediately withdraw. Because the pro-life speaker is now within the 8-foot zone, the pro-choice escort has quickly and effectively censored the pro-life speaker. Because the 8-foot zone is always moving, the pro-life person must continue to retreat. No one on the pro-choice side of the issue is ever subject to the injunction's cease and desist provision.

The "consent" provision enacts a sweeping ban of pro-life speech. No such ban exists on pro-choice speech. Such differential treatment is unconstitutional. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The statute singles out abortion-related speech for censorship. The predominant purpose of the statute is to suppress the expression of pro-life views.

II.

THE STATUTE IS AN UNCONSTITUTIONAL PRIOR RESTRAINT.

A prior restraint bears a "heavy presumption" against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The state must meet a "heavy burden" to impose a prior restraint on speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1963); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980); *Near v. Minnesota*, 283 U.S. 697, 713 (1931). The presumption against prior restraints is heavier, and the degree of

protection broader, than that against limits on expression imposed by criminal statutes. Society "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 526, 559-60 (1975) (emphasis in original).

This Court has previously noted that in "determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the (first amendment) to prevent previous restraints upon publication." *Near*, 283 U.S. at 713. Indeed, this Court has stated that "the prevention of [prior restraints] was the leading purpose in the adoption of [the first amendment]." *Lovell v. Griffin*, 303 U.S. 444, 451 (1938); *See also Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968) ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.").

Moreover, a prior restraint finding is not fully dependent on a content-based finding. The injunction in *Carroll* was content-neutral but was analyzed as a prior restraint. *Carroll*, 393 U.S. at 181. The Supreme Court has traditionally condemned licensing schemes as prior restraints without regard to content restrictions. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992) (parade permits); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (*Shuttlesworth II*) (public demonstration permits); *Lovell*, 303 U.S. at 444 (literature distribution permit).

The vice of a prior restraint is not that the restriction is content-based, but that it lends itself to those purposes.[6] Whether

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[6] A prior restraint lends "itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Such a deterrent "need not affect total suppression in order to create a prior restraint." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 n.8

the decision maker is a judge, or an individual with whom discretionary licensing power is vested, makes no difference -- both are prior restraints regardless of whether the restriction is facially content-based. The fact that the decision maker is able to make content-based restrictions is enough for a prior restraint. The statute merely serves as a baton by which the government passes to private individuals the right of prior restraint over picketers in a traditional public forum. Because the "consent" provision is a prior restraint, the level of scrutiny equals or exceeds that applicable to content-based restrictions. As content-based restrictions come to the court with a heavy presumption against their constitutionality, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), so prior restraints are presumptively invalid. *See New York Times Co.*, 403 U.S. at 713; *Bantam Books*, 372 U.S. at 70; *See also* Blasi, *Toward a Theory of Prior Restraint: A Central Linkage*, 66 MINN. L. REV. 11 (1981).

The protection against prior restraints necessarily embraces the distribution of pamphlets and leaflets, which "indeed have been historic weapons in the defense of liberty." *Lovell*, 303 U.S. at 452. "Freedom to distribute literature to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved." *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943). Reaffirming that all persons have a right to receive information without prior restraint, this Court stated that "pamphlets have proven most effective instruments in the dissemination of opinion." *Id.* at 145 (*quoting Schneider v. New Jersey*, 308 U.S. 147, 164 (1939)).

Vesting the right to suppress free speech in the discretion of private citizens creates a substantial risk of the suppression of ideas. *See Thornhill*, 310 U.S. at 88. In *Forsyth County*, this Court found that a parade permit ordinance vested excessive discretionary power

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(1975). Vesting the right to suppress speech to the discretion of the decision maker results in a prior restraint. *See Thornhill v. Alabama*, 310 U.S. 88, 90 (1940). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* at 97.

in administrative officials. 505 U.S. at 123; *See also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The "consent" provision clearly creates a discretionary license to suppress speech. Discretionary licenses to suppress speech violate the core of the First Amendment.

III.

THE STATUTE IS NOT A REASONABLE TIME, PLACE AND MANNER RESTRICTION.

Government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *See also City of Houston v. Hill*, 482 U.S. 451, 464-67 (1987) (requiring that regulations on free speech be "narrow and precise"). A regulation "is not narrowly tailored if a less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988); *See also Wygant v. Jacksonville Bd. of Edu.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

Under the statute, a person walking within 100 feet of a health care facility must stay at least 8 feet away from another person when passing a leaflet, displaying a sign, or when protesting, counseling or providing education. In essence, the person must keep silent in order to avoid prosecution. The statute has created numerous floating "no-speech" zones. This general prohibition against free speech within traditional public fora is not narrowly tailored.

A restriction on free speech must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

Speech related to abortion is political speech and is "entitled to the fullest possible measure of constitutional expression." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 816 (1984). "An assertion that . . . 'Abortion is

Murder,' that every woman has the 'Right to Choose' . . . is just as strong as [political speech]." *Id.*

In balancing the right of free speech against other individual rights this Court has held that there is a "narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson v. Freeman*, 504 U.S. 191, 213 (1992)(Kennedy, J., concurring).[7] Traditionally, this "narrow area" is only applied in cases involving content neutral restrictions or limitations on free speech. *See Rowan v. United States Post Office Dep't.*, 397 U.S. 728 (1970); *Ward*, 491 U.S. at 781; *Public Utilities Comm'n. v. Pollack*, 343 U.S. 451 (1952); and *Kovacs v. Cooper*, 336 U.S. 921 (1949).

Significantly, this yielding of First Amendment rights to other competing rights becomes even narrower when confronted with restrictions on political speech and expression. The right to political expression lies at the core of the First Amendment. *See Meyer v. Grant*, 486 U.S. 414, 420 (1988).

Reasonable time, place, and manner restrictions on expression

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[7] Though the content-based restriction in *Burson* was upheld, that case differs from the instant case. First, the right to vote is the right of all rights, without which no other right exists. *Burson*, 504 U.S. at 198; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious . . . . Other rights, even the most basic, are illusory if the right to vote is undermined"). Second, the restriction was based on history to the extent that Justice Scalia found the sidewalks lost their public forum status. *Burson*, 504 U.S. at 214-16 (Scalia, J., concurring). Finally, abortion "is much less explicitly protected by the Constitution than, for example, the right of free speech." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993). If reasonable state regulations designed to "persuade [a woman] to choose childbirth over abortion will be upheld," then individual free speech of a similar persuasion cannot be prohibited. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

are permissible only if the regulation is content neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative means of communication. *See Ward*, 491 U.S. at 798-99; *Frisby*, 487 U.S. at 481; *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Education Association v. Perry Local Educators Association*, 460 U.S. at 45.

The statute goes beyond restricting mere timing, location, and violent or harassing activity. In fact, *there is no evidence of violent activity*.

The state "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Simon & Schuster v. New York Crime Victims Board*, 502 U.S. 105, 121 (1991); *Ward*, 491 U.S. at 799; *Frisby*, 487 U.S. at 485. The statute on its face bans the distribution of literature absent "invited contact." As this Court has recognized:

> A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evil that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion or noise . . . . For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interest justifying it.

Ward, 491 U.S. at 799 n.7 (citation omitted).

Clearly the floating bubble zone statute is unconstitutional under the principles enunciated by this Court in *Ward*. Moreover, the statute is unconstitutional pursuant to the principles laid down by this Court in *Schenck v. Pro-choice Network of Western New York*, 519 U.S. 357 (1997). Applying the test that a content-neutral injunction may "burden no more speech than necessary", which test was formulated in part based upon the principles of *Ward*, this Court stated as follows:

> We strike down the floating buffer zones around people entering and leaving clinics because they burden

> more speech than is necessary to serve the relevant governmental interest. The floating buffer zones prevent defendants -- except for two sidewalk counsellors, while they are tolerated by the targeted individual -- from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.

Schenck, 519 U.S. at 358.

If this Court struck down a floating bubble zone in the context of protesters who had a rambunctious past history of protesting, then this Court should surely strike down a floating bubble zone statute that is applied or can be applied to individuals with a pristine past. The Ninth Circuit Court of Appeals, based on this Court's opinion in *Schenck*, struck down an ordinance in Phoenix, Arizona, which regulated all demonstration activity within one hundred feet of a clinic by imposing a floating eight foot bubble zone. *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). The *Sabelko* court observed the following:

> The Phoenix ordinance suffers the same defects as the injunction in *Schenck*. It contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance. An individual within the access area to a clinic can invoke the eight-foot floating buffer zone, effectively preventing handbilling and normal conversation. Demonstrators who attempt communication with an individual must constantly monitor themselves to ensure that they do not encroach upon that individual's or another individual's floating buffer zone. Further, the

> demonstrators are faced with the problem of determining which people within the access area have invoked the protection offered by the buffer zone.

Sabelko, 120 F.3d at 164.

The floating bubble zones under the Colorado statute are clearly unconstitutional because the bubble zones burden more speech than necessary to serve any relevant governmental interest.

Petitioners do not shed their constitutional rights when they enter the forbidden zone. *See Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). This right "extends to the communication of ideas by handbills and literature as well as by the spoken word." *Taxpayers for Vincent*, 466 U.S. at 810 (citing *Jamison v. Texas*, 318 U.S. 413, 416 (1943)); *See also Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The ban on handbilling is substantially broader than any alleged interest and is not a *reasonable* time, place, and manner restriction.

This restrictive ban on expressive activities does not leave open ample alternative means of communication. "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker*, 393 U.S. at 513. Petitioners should not have the exercise of their "liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 526, 556 (1975) (quoting *Schneider*, 308 U.S. at 163).[8] The right to speak "extends to the aggressive and disputatious as well as to the meek and acquiescent." *Martin*, 319 U.S. at 149. Unfortunately, the statute

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[8] *See also Taxpayers for Vincent*, 466 U.S. at 812 (restriction on expressive activity may be invalid if "remaining modes of communication are inadequate"); *Grace*, 461 U.S. at 180-81 (existence of other streets and sidewalks is not a sufficient alternative to justify a total ban).

takes away this right and is therefore unconstitutional.

The bubble zones forbid speech even when the speech-related conduct in no way obstructs or impedes access to the abortion clinic. This Court noted that as "a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech, in order to provide adequate breathing space to the freedom protected by the First Amendment." This "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times Co.*, 376 U.S. at 721 (*quoting NAACP v. Button*, 371 U.S. 415, 445 (1963)).

IV.

THE STATUTE IS OVERBROAD AND VAGUE.

A.

The Statute Is Overbroad.

When free speech is at stake, "precision of drafting and clarity of purpose are essential." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). Because of the substantial overbreadth of the Injunction, Petitioners' challenge is both as applied and on its face. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 796 (1984).[9]

An overbroad regulation is subject to a facial challenge. A facial challenge is appropriate here because the Injunction "lends itself to harsh and discriminatory enforcement by local prosecuting

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[9] *See also Saia v. New York*, 334 U.S. 558 (1948) (facial challenge permitted because of discretion given to law enforcement); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)(facial challenge permitted because of a licensing requirement without appropriate standards); *Schneider v. New Jersey*, 308 U.S. 147 (1939)(same); *Hague v. CIO*, 307 U.S. 496 (1939) (facial challenge permitted because of uncontrolled discretion).

officials against particular groups deemed to merit their displeasure" and ultimately results in a "pervasive restraint" on free expression. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). The statute's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

A Phoenix bubble zone ordinance restricting pro-life speech suffered from the same fate as does the statute. When a Statute singles out pro-life speech to be unlawful after failing to withdraw upon a clearly communicated request to do so, the Ninth Circuit Court of Appeals ruled such language "contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance." *Sabelko v. The City of Phoenix*, 120 F.3d 161, 164 (9th Cir. 1997).

The ban on handbilling is broader than necessary. *See Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989). The Constitution affords Petitioners the opportunity to win the attention of the listener. *See Kovacs*, 336 U.S. at 87. City streets and sidewalks are recognized "as a normal place for the exchange of ideas by speech or paper." *Id.* Indeed, one "need not ponder the contents of a leaflet or pamphlet in order to mechanically take it out of someone's hand." *ISKCON v. Lee*, 505 U.S. 689 (1992) (*quoting United States v. Kokinda*, 497 U.S. 720, 734 (1990)). Since the "distribution of literature does not require that the recipient stop in order to receive the message a speaker wishes to convey," the restriction under the statute is substantially broader than necessary. *ISKCON*, 505 U.S. at 689. As this Court has recognized, the fact that a vague and overbroad restriction "lends itself to selective enforcement against unpopular causes" is enough to find it unconstitutional. *NAACP v. Button*, 371 U.S. 415, 435 (1963).

B.

The Statute Is Vague.

A statute is considered unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine ensures that "all be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). The prohibition against overly vague laws protects citizens from having to voluntarily curtail their First Amendment activities because of fear that those activities could be characterized as illegal. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). "Precision of regulation" is the touchstone of the first and fourteenth amendments.[10]

Vague laws "may trap the innocent by not providing fair warning," "provide for arbitrary and discriminatory enforcement," impermissibly delegate policy matters to enforcement officials on an "*ad hoc* and subjective basis," and consequently chill free expression. *Id.* at 108-09; *See also Baggett v. Bullitt*, 377 U.S. 360, 374 (1964) ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law"). This Court must apply strict scrutiny to the Injunction because its vagueness has an "inhibiting effect on speech." *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976); *See also Buckley v. Valeo*, 424 U.S. 1, 76-82 (1976); *Smith v. California*, 361 U.S. 147, 151 (1959).

The statute grants a person seeking the services of the Clinic a license to squelch speech if that person is offended. The consent provision is no less vague than the term "annoying," *Coates*, 402 U.S. at 612-14, "treats contemptuously," *Smith v. Goguen*, 415

[10] *NAACP v. Button*, 371 U.S. 415, 435 (1963). Vague laws violate both free speech and due process. *Cf. Grayned*, 408 U.S. at 108-09 (noise ordinance); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (loitering law); and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting three or more persons from assembling in an annoying manner void for vagueness).

U.S. 566 (1974), or "abusive language." *Gooding v. Wilson*, 405 U.S. 518 (1972).

The vagueness in the floating bubble zone requires Petitioners to "steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The threat of sanctions as a result of the vagueness clearly chills free expressio Rather than providing "breathing space," the statute suffocates speech. *Button*, 371 U.S. at 433.

V.

THE STATUTE VIOLATES PETITIONERS' RIGHT TO FREE ASSOCIATION.

Like the freedom of speech, the right to free association is a fundamental right protected by the First Amendment.[11] It is beyond dispute that the First Amendment "protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). To limit "the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control*, 454 U.S. at 300.

The right to free association "applies to the beliefs we share," and though government "may not tell a man or woman who his or her associates must be," the statute does just that. *Gilmore v. City of Montgomery*, 417 U.S. 566, 575 (1974); *See also NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

Free association may not be denied "merely because an individual belongs to a group, some members of which committed

[11] *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300 (1981); *Healy v. James*, 408 U.S. 169, 181 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969); *Bates v. City of Little Rock*, 361 U.S. 516, 522 (1960); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

acts of violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). [12] Expression regarding issues of public concern "has always rested on the highest rung of the hierarchy of First Amendment values." *Id.* at 913 (*quoting Carey v. Brown*, 447 U.S. 455, 467 (1980)).

> If the rights of free speech and peaceable assembly are to be preserved [the question is] not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or engaged in a conspiracy against the public peace and order, they may be prosecuted for the conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

De Jonge, 299 U.S. at 365.

Since the "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process," any restriction on group advocacy should meet with strict scrutiny. *Citizens Against Rent Control*, 454 U.S. at 294. The right to free speech protects the marketplace for "the clash of different views and conflicting ideas," and oftentimes this "clash" can only be achieved when individuals collectively combine to make known their views because individually their "voices would be faint or lost." *Citizens Against Rent Control*, 454 U.S. at 294-95. While there may be some activities "legal if

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[12] Justice Black was right on point when he stated, "I do not believe that it can be too often repeated that the freedoms of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied the ideas we cherish." *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

engaged in by one, yet illegal if performed in concert with others, . . . political expression is not one of them." *Id.* at 296. The reason the first amendment protects free association is because effective advocacy, particularly on "controversial" issues, is "undeniably enhanced by group association." *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958).

This Court has stated that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908. This Court has also stated that a "'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.'" *Scales v. United States*, 367 U.S. 203, 229 (1961).

The First Amendment clearly protects group association to protest practices that segments of the public find reprehensible. *See Thornhill v. Alabama*, 310 U.S. 88, 99 (1940)(picketing intended to "induce the customers not to patronize the employer"). Moreover, as this Court noted in *Claiborne Hardware*, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." 458 U.S. at 910.

CONCLUSION

In light of the above, this Court should reverse the judgment of the Colorado Supreme Court.

Respectfully submitted,

Mathew D. Staver
Florida Bar No. 0701092
(Counsel of Record)
Erik W. Stanley
Florida Bar No. 0183504
LIBERTY COUNSEL
1900 Summit Tower Boulevard
Suite 540
Orlando, Florida 32810
(407) 875-2100

November 10, 1999

Supreme Court, U.S.
FILED
NOV 12 1999
CLERK

(7)

No. 98-1856

IN THE
Supreme Court of the United States

LALIA JEANNE HILL, *et al.*,
Petitioners,

v.

COLORADO,
Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JONATHAN P. HIATT
815 15th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD *
805 15th Street, N.W.
Washington, D.C. 20005
(202) 842-2600

* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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Turner Broadcasting System v. FCC, 512 U.S. 622 (1994)	9
United States v. Kokinda, 497 U.S. 720 (1990)	2, 13
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	*passim*

IN THE

Supreme Court of the United States

No. 98-1856

LALIA JEANNE HILL, *et al.*,
Petitioners,

v.

COLORADO,
Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, a federation of 68 national and international unions representing approximately 13,000,000 working men and women, with the consent of the parties as provided for in the Rules of this Court.

Historically, the AFL-CIO, and its affiliated unions, have had a vital interest in the First Amendment rights

of citizens to disseminate their views on the public streets by picketing, handbilling and other communicative means. Indeed, many of the leading cases that this Court has decided in the First Amendment area have involved the efforts of union members to engage in such expressive activities.[1] That being so, the AFL-CIO has filed briefs as an *amicus curiae* in a substantial number of this Court's recent cases involving the exercise of First Amendment rights on the streets.[2] And, it is in furtherance of that interest that the AFL-CIO files this brief *amicus curiae* in the instant case.

SUMMARY OF ARGUMENT

Four aspects of the Colorado statute in question here frame the constitutional issue:

First, although the articulated legislative purpose is preventing "willful obstruction of a person's access" to medical facilities, the Statute applies whether or not the individual whose speech is thus prohibited has in the past obstructed or is currently obstructing, or threatening to obstruct, any other individual's access to the medical facility.

Second, the Statute singles out speech for prophylactic regulation.

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1 *See, e.g., Hague v. CIO*, 307 496 (1989); *Schneider v. State*, 398 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1954); *DeBartolo v. Florida Gulf Coast Trades Council*, 486 U.S. 568 (1988).

2 *See, e.g., Schencke v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center*, 512 U.S. 752 (1994); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 483 U.S. 589 (1987); *Heffron v. International Society for Krishna Consciousness*, 453 U.S. 540 (1981).

Third, the Statute entirely precludes normal handbilling and leafletting.

Fourth, the Statute as it applies to oral communication regulates speech on the basis of its content.

The Colorado Supreme Court viewed this case as one raising only the validity of a limited time, place and manner statutory restriction on speech in a public forum. And, a "content-neutral" statutory regulation of speech in a public forum, such as a public sidewalk, can pass First Amendment muster if it furthers a substantial governmental interest unrelated to the suppression of speech and is narrowly tailored to that interest. The office of the narrow tailoring requirement is to preclude regulation that "burdens substantially more speech than is necessary to further the government's legitimate interests," *Ward v. Rock Against Racism*, 491 U.S. 785, 791 (1989).

The Statute in this case states the only government interest Colorado has ever asserted: "preventing the willful obstruction of a person's access to medical counseling and treatment at a health care faciilty." And, the handbilling, leafletting, sign display and oral protest the statute restricts do not in and of themselves involve physical obstruction of access to the addressee's destination whether the individual engaged in the communicative activity approaches within eight feet of the addressee or not. Any connection between the prohibited speech activity and obstruction is entirely contingent.

This Court has never sanctioned a purely contingent connection of this kind as the basis for a prophylactic prohibition of protected speech actiivty in a public forum. To the contrary, where, as here, speech activity can be carried out in a way that does *not* compromise a neutral non-speech governmental interest *or* in a way that does compromise the latter, the Court has approved a time,

place and manner restriction *only* where the regulation restricts speech activity that in fact involves an *actual* intrusion on the non-speech government interest, and the regulation does *not* restrict speech activity that does *not* in fact involve an actual intrusion on the non-speech government interest.

The Statute here does not respect that limitation for it enacts a general prophalactic restriction on public forum speech actiivty that without limit or distruction applies to speech activity that does not in fact involve any physical obstruction of access. That being so the Statute fails the narrow tailing requirement of the First Amendment time, place and manner standard.

ARGUMENT

CONSIDERED AS A TIME, PLACE AND MANNER LIMITATION ON SPEECH IN A PUBLIC FORUM THE COLORADO STATUTE IS UNCONSTITUTIONAL IN THAT IT BURDENS SUBSTANIALLY MORE SPEECH THAN IS NECESSARY TO FURTHER THE GOVERNMENT'S LEGITIMATE, NON-SPEECH RELATED INTERESTS.

A. The Colorado statue at issue in this case, Section 18-9-122 C.R.S. (1994 Cum. Supp.) ("the Statute") reads, as here relevant:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in a nunobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern.
>
> The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstruction another person's entry to or exit from a health care facility.
>
> * * *
>
> (3) No person shall knowingly approach another person within eight feet of such person unless such other person consents for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

Four aspects of this criminal prohibition are particularly significant for purposes of constitutional analysis:

First, although the articulated legislative purpose is preventing "willful obstruction of a person's access" to medical facilities, the Statute applies *whether or not the individual whose speech is thus prohibited has in the past obstructed or is currently obstructing, or threatening to obstruct, any other individual's access to the medical facility*. The plaintiffs here, for example, were prevented from coming closer than eight feet to pedestrians on public sidewalks near medical clinics even though they "have not engaged in, and do not intend to engage in, . . . dangerous and harassing conduct." *Hill* v. *Thomas,* 973 P.2d 1246, 1251 (Colorado S. Ct. 1999).

Thus, as this case illustrates, the Statute's prohibition obtains even though there is *no* basis for concluding that activity of the kind proscribed, considered either individually or in the aggregate, by its nature, or by habitual practice, entails "obstruction of a person's access" to a medical facilty. And, to make the matter all the more binding, the Statute's prohibition obtains at *all* health care facilities, including many types of facilities at which there has never been obstruction of access by any handbillers, leafletters, sign displayers or oral protestors.

Second, the Statute singles out speech for prophylactic regulation, even though the articulated legislative purpose is to prevent conduct that can occur with or without speech, and even though it is not unusual for one individual to come closer than eight feet to another individual on the public streets without the latter's express consent.

An individual can engage in conduct that obstructs another individual's access to a medical facility without also engaging in leafletting, handbilling, sign display or oral protest. And, individuals engaging in such obstructive conduct would do so by approaching within eight feet of

the individuals seeking access to the facility. So far as we are aware, however, neither this Statute, nor any other Colorado statute, prevents individuals on public sidewalks 100 feet from medical facilities from coming closer than eight feet to other individuals *unless* the approaching individual is engaged in leafletting, handbilling, sign display or oral protest. With the one exception of this Statute, then, Colorado regulates the behavior of persons on the public streets in order to prevent obstruction of access to medical facilities only by proscribing *actual* obstruction.

Third, the Statute entirely precludes normal handbilling and leafletting. Ordinarily, a handbiller or leafletter does not stand in a location and wait to be approached by passersby. Doing so is unlikely to attract many takers for the simple reason that by and large individuals on public streets are bound for a destination on a determined course. That being so, a handbiller, after choosing a location at which she can reach her intended audience, walks a few steps toward individuals making their way to that location, coming close enough to extend her arm and make it possible for passersby to take the handbill by simply extending their arms slightly without changing their course. Since few people have arms that are four feet long, the eight-foot limitation here precludes handbilling in its normal sense.

The "consent" exception does not alter this conclusion. Again, individuals who are on the public street are normally going somewhere. While such pedestrians may take a proffered handbill and read it then, or later, if they can do so without straying from their intended path, they are unlikely in the extreme to cease their progress toward their destination in order to consider a request from a handbiller standing eight feet away to permit the opportunity to

make the proffer. Indeed, by the time the handbiller is able to intelligibly verbalize a request for consent to approach the addressee, the passerby is likely to be even further away from the handbiller than originally, and even less likely to halt or reverse direction in order to answer the request and then receive the handbill.[3]

Fourth, the Statute as it applies to oral communication regulates speech on the basis of its content. An individual who approaches closer than eight feet to another individual on a public street within 100 feet of a medical facility to ask for directions or for the time, to conduct a survey, to hand out free samples of a product and pitch the product's virtues, or to solicit funds for a charity is not, in any ordinary use of the words, "engaging in oral protest, education, or counseling." Such an individual is therefore free to approach other individuals near medical facilities as elsewhere, whether the person approached has consented to the conversation in advance or not.

In contrast, anti-abortion protestors such as the plaintiffs here, workers seeking to inform patients of a labor dispute at the medical facility and request support for a boycott, animal rights protestors desiring to educate users of a medical facility of the use of animals in experiments and training so that the patients will complain to their

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[3] All of the foregoing is equally applicable to an individual on a public forum who wishes to communicate her oral protest message to passersby.

In contrast, signs can be made visible at a distance of eight feet, and no further communication or interaction with the addressee is needed to convey the sign displayer's message. Thus, an eight foot space limitation on the display of signs cannot by a parity of reasoning, be said to preclude normal sign display in the same manner as the limitation precludes handbilling. But the limitation, we believe, does have a "material impact" on the sign display form of communication by placing artificial constraints on a speech activity that is protected by the First Amendment and that does not intrude on any legitimate government interest. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

doctors, and other patients seeking to communicate with fellow users of the facility concerning problems with the services provided—not unusual in this era of discontent with managed medical care—would all be subject to the eight foot/consent limitation. By any measure, this regulation of oral communication is regulation of speech on the basis of its content.

Given these four characteristics, the Statute is, under this Court's precedents, unconstitutional, and cannot stand—as we now show.

B. The Colorado Supreme Court viewed this case as one raising only the validity of a limited time, place and manner restriction on speech in a public forum. There is, we believe, a substantial question as to whether that is a proper characterization of the statute here. But because the Statute so clearly fails the time, place and manner standard, we accept and proceed on the Colorado Supreme Court's premise rather than joining the issue at this threshold point.

Other considerations aside, a "content-neutral" regulation of speech in a public forum, such as a public sidewalk, can pass First Amendment muster if it furthers a substantial governmental interest unrelated to the suppression of speech and is narrowly tailored to that interest. *Turner Broadcasting System, Inc. v. Federal Communications System, Inc.*, 512 U.S. 622, 662 (1994), *citing Ward v. Rock Against Racism, supra.* The office of the narrow tailoring requirement is to preclude regulation that

> burdens substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . [*Ward*, 491 U.S. at 799.]

Thus, although the time, place and manner intermediate level of scrutiny regarding the "fit" between the governmental interest and the breadth of regulation is less than that applied in other First Amendment contexts, the judicial inquiry into the relationship between means and ends is a careful one, "focussing on the evils the [Government] seeks to eliminate" and asking whether the regulation at issue "significantly restrict[s] a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799 n.7; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 297 (1984).

The Statute in this case recites in its body the only government interest Colorado has ever asserted: "preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility." Section 18-9-122(1) C.R.S. (1994 Cum. Supp.). Focusing, as this Court has directed, on that "evil," it is apparent that the Statute "significantly restricts a substantial quantity of speech that does *not* involve the "willful obstruction of a person's access to . . . a health care facility."

Handbilling, leafletting, sign display and oral protest do not in and of themselves involve physical obstruction of access to the addressee's destination whether the individual engaged in the communicative activity approaches within eight feet of the addressee or not. Rather, the Legislature relied on the fact that "on occasion" individuals approaching a particular kind of medical facility—those at which abortions are performed—have been "physically assaulted [by anti-abortion protestors] while entering or leaving" those health care facilities. 973 P.2d at 1250. In other words, the connection between the prohibited speech activity and obstruction is entirely contingent: In some instances—"on occasion"—speech activities abutting on medical faciilties are associated with

obstruction through physical assaults or otherwise. In other instances, by definition the majority, the handbillers/protestors, like the petitioners in this case, never pose the "evil" of obstruction of access through physical assault or otherwise at which the Statute is aimed.[4]

This Court has never sanctioned a purely contingent connection of this kind as the basis for a prophylactic prohibition of protected speech activity in a public forum. Rather, the time, place and manner restrictions that the Court has sanctioned have rested on a necessary connection between the speech activity regulated and the "evil" the Government "seeks to eliminate."

(1) In some instances, the non-speech governmental interest is "intrinsic" to each exercise of a speech activity, so that the unregulated speech activity is "naturally incompatible with a large, multipurpose forum." *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 690 (1992) (O'Connor, J. concurring). For example, in *Ward, supra,* the regulation at issue dealt with the "evil" of "excessive and inadequate sound amplification" at concerts in a public park. That regulation governed only concerts that were sound amplified and the regulation did so not by "ban[ning] all [such] concerts, or even all rock concerts, but instead by focus[ing] on the source of the evils the city seeks to eliminate—excessive and inadequate sound amplification—and eliminates them without at the same time restricting a substantial quantity of speech that does not create the same evils." 491 U.S. at 799, n.7.[5]

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[4] This is particularly true because the Statute applies to all medical facilities, while the instances that led to legislative concern appear to have been protests at abortion facilities.

[5] The Court in *Ward*, indeed, explicitly contrasted the impact of the regulation in that case with the impact of a ban on handbilling,

Similarly, in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the government interest served by the challenged restriction was elimination of visual clutter. By banning signs attached to utility poles, "the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808. In explaining this conclusion, the Court contrasted such an "intrinsic" connection between a governmental interest and a mode of communication with a contingent connection, making clear that the former but not the latter meets the narrow tailoring aspect of the time, place and manner standard:

> It is true that the esthetic interest in preventing the kind of litter that may result from the distribution of leaflets on the public streets and sidewalks cannot support a prophylactic prohibition against the citizens' exercise of that method of expressing his views. . . . *Schneider v. State*, 308 U.S. 147 (1939) . . . The rationale of *Schneider* is inapposite in the context of the instant case . . . [T]here is no constitutional impediment to "the punishment of those who actually throw paper on the streets. . . ." With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In *Schneider*, an anti-littering statute could have addressed the substantive evil without prohibiting expressive activity . . . . Here, the substantive evil—visual blight—is *not merely a possible by-product of the activity but is created by the*

noting that the latter "of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate . . . . [and] would be substantially broader than necessary to achieve the interests justifying it." *Id.* As noted above and discussed further below, the Statute in this case amounts as a practical matter to a ban on handbilling near a medical facility.

> *medium of expression itself*. In contrast to *Schneider*, therefore, the application of ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. [466 U.S. at 808-810, emphasis supplied.][6]

Here, in contrast, there is nothing intrinsically obstructive in the leafletting, handbilling, sign display, and oral protest modes of communication at less than eight feet from the intended addressee; only when the speaker *also* engages in physically obstructive conduct are the two conjoined.

(2) Where a speech activity on a public forum and the non-speech "evil" the Government "seeks to eliminate" are only contingently connected, the Court has recognized that the regulation is valid only where it is confined to prohibiting speech that is *in fact* conjoined with that evil.

[6] *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981)—which upheld a prohibition on "roving solicitation" and the related distribution of literature at a state fair based on the special concern with the "orderly movement of the crowd" at the fairgrounds—is in this line. 452 U.S. at 451. The *Heffron* Court proceeded on the theory that roving solicitation as a class of speech activity has an inherent adverse effect on the state's "important concern with managing the flow of the crowd." *Id.* at 452.

It is worthy of note in this regard that *Heffron* involved speech at a state fairgrounds, not on a public forum, and arose before this Court's tripartite forum analysis had fully chrystallized. It is far from clear that a similar regulation of public streets would be valid. *See, United States v. Kokinda*, 497 U.S. 720 (1990) (approving limitation on solicitation on sidewalk abutting post office only after concluded that the particular sidewalk was a non-public forum, and that a "reasonableness" standard rather than "narrowly tailored" standard applied.)

And, be that as it may, there is no basis for the proposition that public forum leafletting, handbilling, sign displays and oral protests are, as classes of speech activity, inherently or intrinsively obstructive activities and subject to government restriction as such.

Thus, for example, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a city concerned with preventing school disturbances passed an ordinance providing that:

> "[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." Code of Ordinances, c. 28, 19.2(a) [408 U.S. at 108.]

The Court in upholding that ordinance stressed that the required "disturbance" element was essential to the validity of the ordinance as a constitutionally acceptable time, place and manner restriction:

> Without interfering with normal school activities, daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students, some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse. . . . [408 U.S. at 119-120, footnotes omitted.]

The *Grayned* ordinance, consequently, was valid precisely because it was limited to situations in which there was actual disturbance of the educational process by reason of the manner in which the protest was carried out, and because it permitted peaceful expressive activity which was not loud or raucous enough to cause such a disturbance:

> *Far from having an impermissibly broad prophylactic ordinance,* Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. *That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted.* And the ordinance gives no license to punish anyone because of what he is saying. [408 U.S. at 120, footnotes omitted, emphasis added.]

Similarly, in *Boos v. Barry*, 485 U.S. 312, 330-331 (1988), this Court concluded that a statute proscribing assemblies near foreign embassies "did not reach a substantial amount of constitutionally protected conduct" only after construing the statute so that it "does not prohibit peaceful congregation . . . [but] is limited to group posing a security threat." 485 U.S. at 331.

In short, where, as here, speech activity can be carried out in a way that does *not* compromise a neutral non-speech governmental interest *or* in a way that does compromise the latter, the Court has approved a time, place and manner restriction *only* where the regulation restricts speech activity that in fact involves an *actual* intrusion on the non-speech government interest—here, actual obstruction of access to medical facilities—and the regulation does *not* restrict speech activity that does *not* in fact involve an actual intrusion on the non-speech government interest.

The lesson of the foregoing for the instant case is this. The Statute here is a general phophylactic regulation of speech activity on a public forum that Colorado justifies by the legitimate government interest in preventing willful obstructions of access. But the Statute's prohibitions apply without limit or distinction to speech activity on that forum that is not intrinsically conjoined with obstructive

conduct and that does *not* in fact involve any physical obstruction of access. The Statute thus regulates expression "in such manner that a substantial portion of the burden on speech does *not* serve to advance the [regulatory] goals." *Ward*, 491 U.S. at 799 (emphasis added). That kind of overbroad regulation is the very antithesis of the "narrow tailoring" the First Amendment time, place and manner standard requires.[7]

C. It is of the essence here that the weight of the Statute's overbroad prohibitions is brought to bear on the most basic and sensitive free speech rights.

(1) As this Court has long recognized, "leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment . . . ." *Scheneck*, 519 U.S. at 377. Indeed, distribution of literature in the public streets is at the core of the

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7 Our demonstration in text that the Statute does not meet the "narrow tailoring" requirement is sufficient to require its invalidation on constitutional grounds without more. But there is more and we would be remiss if we did not briefly elaborate on an additional ground of invalidity we foreshadowed at the outset—the statute's regulation of oral communication is infected with unconstituitonal content discrimination. The Satute singles out from the universe of discourse "oral protest, education or counseling" and burdens only public forum communication of an oral protest/education/counseling message. And the Statute does so in the face of this Court's admonition that

> above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control . . . .
>
> Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. [*Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972).]

Plainly then this aspect of the Statute can not stand.

constitutional guarantees of both freedom of speech, *e.g.*, *Jamison v. Texas*, 318 U.S. 413, 416 (1943), and freedom of the press, *e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). And the protection that has been accorded this form of expression stems precisely from the recognition that "pamphlets have proved most effective instruments in the dissemination of opinion." *Schneider v. State*, 308 U.S. 147, 164 (1939). Thus, as the Court said in *Jamison*:

> [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word. [318 U.S. at 416.]

All this being true, from its seminal opinion in *Lovell*, *supra*—in which the Court struck down a municipal ordinance under which a Jehovah's Witness had been prosecuted for distributing religious tracts without permission from the city authorities—the Court has accorded constitutional protection to the activities of persons who were prosecuted or threatened with prosecution by local authorities for distributing handbills or leaflets addressing labor disputes, *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Schneider*, 308 U.S. at 155-57, political and social concerns, *Schneider*, 308 U.S. at 154-55; *Schenck*, *supra*, and religious causes, *Lovell*, *supra*; *Schneider*, 308 U.S. at 157-59; *Jamison*, *supra*; *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam). *See also, e.g., DeBartolo Corp v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988) (construing National Labor Relations Act to allow certain handbilling actiivty in order to avoid serious constitutional issue under First Amendment).

In so doing the Court has made it plain that communication on the streets is protected when it persuades to action as well as when it simply provides information or abstract thoughts. The First Amendment extends

> to more than abstract discussion, unrelated to action. . . . "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. [*Thomas v. Collins*, 323 516, 537 (1945.)]

And, persuasive speech at the site at which a responsive action is requested, rather than on a remote unconnected street corner, comes within this constitutional protection. *See Thornhill v. Alabama*, 310 U.S. 88, 91-92, 105-106 (statute forbidding protestors from going "near . . . the . . . place of business of any persons . . . for the purpose of . . . inducing other persons not to trade with . . . such persons" as "limited or restricted in its application to such action as takes place at the scene of the labor dispute" is unconstitutional); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 903, 909-910 (1982).

In sum, the right to distribute handbills, pamphlets, leaflets, or other literature in public places at issue here is a core First Amendment activity that is an integral component of the concepts of freedom of speech and freedom of the press the authors of that Amendment sought to protect. Like other aspects of these freedoms, the constitutional protection afforded the right to express one's views through the public dissemination of literature "reflects the belief of the framers of the Constitution that exercise of the[se] rights lies at the foundation of free government by free men." *Schneider*, 308 U.S. at 161.

(2) It follows from the foregoing that overbroad restrictions on public forum speech activity cut directly, and deeply, against the First Amendment grain.

Such restrictions, first of all, silence protected free speech at the Amendment's core and do so without justification in a legitimate government non-speech interest.

Moreover, as this Court has emphasized:

> "A like threat [to licensing discretion] is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." [*Taxpayers For Vincent*, 466 U.S. at 798 n.16 *quoting Thornhill*, 310 U.S. at 97-98.]

By the same token such overbroad restrictions provide a ready means to legislate against the activities of particular groups that in ordinary circumstances and absent the legislation constitute an exercise of free speech. The background made to the Statute here set out in the Colorado Supreme Court's opinions, for example, provide the strongest indication that this Statute is aimed at silencing the *message* of anti-abortion speakers and not simply at preventing physical obstructions and like improper conduct by anti-abortion activists.

Invalidation of the overbroad restrictions on public forum free speech activity here on First Amendment grounds is thus called for both by the time, place and manner narrow tailoring requirement and the free speech principles expressed and safeguarded by that requirement.

D. The burden of our argument is that on a straightforward application of this Court's jurisprudence governing statutory time, place and manner restrictions on speech in a public forum, the Statute here is invalid on its face. It has been suggested, nevertheless, that this Court's decisions in *Schenck*, *supra*, and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1944)—somehow validate the Statute. That is to profoundly misread *Schenck* and *Madsen*.

Both cases concerned the validity of forward-looking injunctive restrictions on the speech activity of persons who had engaged, and were engaging, in speech activity *conjoined* with physically obstructive conduct. In that context, the *Madsen* Court explained that speech restrictions imposed by injunction require a "somewhat more stringent application of general First Amendment principles" than speech restrictions imposed by statutes of general application. *Madsen*, 512 U.S. at 764-765. (The injunctive restrictions are tested by asking "whether the challenged provisions of the injunction burden *no more* speech than necessary to serve a *significant* government interest." *Id.* at 765. As we have seen, in the statutory context the inquiry is whether the restriction "burden[s] *substantially more* speech than is necessary to further the government's *legitimate* interests." *Ward*, 491 U.S. at 799.

These are closely brigaded standards and their nuanced differences hardly bespeak a *carte blanche* for general prophylactive statutory restrictions on public forum free speech activity . Any doubt on that score is resolved by the indisputable point that *Madsen* and *Schenck* did not raise—and the *Madsen* and *Schenck* decisions do not address—any questions concerning the validity of speech restrictions —injunctive or statutory—that run against persons who have *not* engaged, and are *not* engaging, in public forum

leafletting, handbilling, sign display or oral protect activity *conjoined* with any kind of physical obstructive or like abusive conduct. Those cases in other words do not consider the validity of public forum speech restrictions that have *no* predicate in the speaker's past or present obstructive or like abusive conduct . And given the qualitative difference between such restrictions and restrictions so predicated, *Madsen* and *Schenck* most certainly do not suggest that a prophylactic statutory speech restriction of that kind does, or should, pass muster under the basic time, place and manner standard by which public forum statutory speech restrictions are normally tested.

CONCLUSION

Thus we return to where we began—that the Statute here judged under the basic time, place and manner standard is unconstitutional as we have shown.

JONATHAN P. HIATT
815 15th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD *
805 15th Street, N.W.
Washington, D.C. 20005
(202) 842-2600
* Counsel of Record

Supreme Court, U.S.
FILED
NOV 12 1999
OFFICE OF THE CLERK

No. 98-1856

IN THE
Supreme Court of the United States

LEILA JEANNE HILL, *et al.*,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF *AMICUS CURIAE* OF PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS IN SUPPORT OF PETITIONERS LEILA JEANNE HILL, ET AL.

David N. Ventker, Esq.
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
Attorneys for Amicus Curiae

38 pp

QUESTIONS PRESENTED

Colorado law makes it a crime to approach within eight feet of any other person, on a public sidewalk, without that person's consent, for the purpose of engaging in expressive activity toward that person – specifically, passing leaflets, showing signs, or orally educating, counseling, or protesting–if that person happens to be within 100 feet of the entrance to a health-care facility. See Colo. Rev. Stat. § 18-9-122(3). The consent requirement applies even if the person approached is not seeking to enter the facility. See *id.* The general question here is whether this Colorado criminal statute "abridges the freedom of speech, or of the press" guaranteed by the First and Fourteenth Amendments of the United States Constitution. Specifically, this case presents the following questions:

1. Is § 18-9-122(3)'s consent requirement, which vests in citizens absolute unfettered discretion, enforceable by law, to restrict speech by refusing to consent, an unconstitutional prior restraint on speech?

2. Is § 18-9-122(3), which gives legally enforceable consent to stifle speech to anybody who happens to be within 100 feet of a health-care facility entrance and which imposes the consent restriction no matter how deferential or nonthreatening the speaker, narrowly tailored to advance the statute's ostensible purpose of protecting access to health care facilities?

3. Is § 18-9-122(3), which requires speakers to calculate eight feet and to guess, among other things, whether moving one's arm toward a person to pass a leaflet constitutes "approach[ing]," unconstitutionally vague?

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INTEREST OF AMICUS*

People for the Ethical Treatment of Animals, Inc. ("PETA" or *"Amicus"),* is a nonprofit organization dedicated to establishing and protecting the rights of all animals. Its basic tenet is that animals are not ours to eat, wear, experiment on, or use for entertainment. PETA educates policy-makers and the public about animal abuse and promotes an understanding of the right of all animals to be treated with respect.

PETA pursues its goals in part by bringing to public attention practices that it finds objectionable and that, it believes, the public would find similarly objectionable if the public were fully aware of them. One of the principal means of making the public aware of such practices is by communicating with the public. Such communication is achieved by speech in its various forms, be it leafleting, showing signs, or objecting orally. More typically, and most effectively, such communication is achieved simply by talking to people, quietly and at length, about the moral or ethical issue raised by the practice in question.

The locus of PETA's efforts to communicate is often where the practices to which it objects are conducted. One of those practices, experimentation on animals in the name of medical science, frequently is conducted inside health care facilities as

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*Counsel of Record for the parties in this case have consented to filing this brief. This brief was authored in part by John Tuskey, Laura B. Hernandez, and Shannon Demos Woodruff, attorneys for the American Center for Law and Justice (ACLJ). Other attorneys employed by the ACLJ represent petitioners in this case. Amicus PETA represents that no monetary contribution to the preparation of this brief was received from any person or entity other than amicus curiae.

defined in Colo. Rev. Stat. § 18-9-122(4). The criminal prohibition against expressive activity within 100 feet of health-care facilities if such activity is conducted on a public sidewalk within eight feet of another person effectively prohibits the most effective, the only truly lasting way, of communicating -- the face-to-face, person-to-person, mutual exploration of an often complex and subtle moral and ethical issue.

The Colorado law thus substantially curtails PETA's ability to exercise its right of speech as to one of the four principal areas of its concern.

PETA emphasizes that it takes no view whatever on the issue of abortion. Some members and supporters of PETA support broad freedom of choice for women who seek abortion, and some do not. The interests of PETA in this case relate solely to the potential adverse impact on PETA of the Colorado law.

SUMMARY OF ARGUMENT

Colorado Revised Statute § 18-9-122(3) makes it a crime for any person located on a public sidewalk within 100 feet of a "health-care facility"[1] to "knowingly approach" any other person without that person's consent "for the purpose of passing a leaflet, or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling" with that other person. In other words, Colorado has made it a crime to approach a person

[1] "'[H]ealth care facility' means any entity that is licensed, certified, or otherwise permitted by law to administer medical treatment" in Colorado. Colo. Rev. Stat. § 18-9-122(4) (1993).

without his consent to engage in quintessential speech – for example, to give information about animal testing or to hand a person a leaflet advocating or opposing a proposed referendum issue – in a traditional public forum.

The Colorado courts found no constitutional infirmity in § 18-9-122(3) despite the First and Fourteenth Amendments of the United States Constitution, which prohibit states from "mak[ing] [any] law abridging the freedom of speech or of the press." One would think that the ability to at least attempt to communicate with a person reasonably in a traditional public forum falls within the freedom of speech. But the Colorado Supreme Court rationalized Colorado's extraordinary speech restriction by finding that the right to free speech is merely one right to be balanced against other rights. In essence, the Colorado Supreme Court decided that § 18-9-122(3) survives constitutional scrutiny because, on balance, it is more important to allow persons to walk into health-care facilities unbothered by speakers they care not to deal with than it is for persons near health-care facilities to be able to approach others to communicate in a public forum. *See Hill v. Thomas*, 973 P.2d 1246, 1259 (Colo. 1999).

In its opinion, the court noted that "the same constitution that protects the . . . right to free speech . . . also protects the . . . right to abortion services. . . ." *Id.* at 1253 (quoting *Northeast Women's Ctr. v. McGonagle*, 868 F.2d 1342, 1348 (1989)). The court seems to have extrapolated from the right to abortion a more general right to privacy that protects the right to receive other medical services. But even granting the right to abortion, and assuming the more general right to health care, the court transmogrified the right to receive health care *free of undue government interference*, *see Planned Parenthood v.*

Casey, 505 U.S. 833, 846 (1992), into a right to receive such care without being bothered by unwanted speech from private citizens pointing out the consequences of that care – or for that matter on any other subject – on sidewalks near health-care facilities.

Upholding § 18-9-122(3) flies in the face of this Court's free speech jurisprudence. By making the right to approach another person on a public sidewalk to speak depend on that person's consent, § 18-9-122(3) effectively deputizes citizens to censor unwanted speech and thus operates as a prior restraint on speech. And by providing no safeguards to ensure that the citizen-censor does not withhold consent based on the anticipated content or viewpoint of the speech, § 18-9-122(3) encodes into Colorado law the properly-repudiated heckler's veto (or, more precisely here, heckler's license). *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (citation omitted); *see generally Terminiello v. Chicago*, 337 U.S. 1 (1949); *Evans v. Newton*, 382 U.S. 296 (1966).

Moreover, even if the consent provision does not operate as a prior restraint, § 18-9-122(3) restricts far more speech than is necessary to protect Colorado's asserted interest in protecting "access to health care facilities." *See* Colo. Rev. Stat. § 18-9-122(1) (1998). Far from being the narrowly tailored time, place, and manner restriction the Colorado Supreme Court found it to be, § 18-9-122(3) is a blunderbuss restriction of quintessential speech in a public forum – including speech that in no way threatens access to health care. Section 18-9-122(1) is not aimed at threats or harassment; rather, the statute operates no matter how calm, quiet, respectful, and non-threatening a speaker may be. Also, § 18-9-122(3) empowers anyone who happens to be within 100 feet of a health-care facility entrance

– not just those seeking to enter the facility – to be a citizen censor. And, as the Colorado Court of Appeals freely admitted, § 18-9-122(3) in essence prohibits *all* unconsented leafleting within 100 feet of a health-care facility. *See* Pet. App. at 56(a)-57(a).

Section 18-9-122(3)'s vagueness exacerbates its lack of narrow tailoring. For example, when does speech constitute "protest," "education," or "counseling"? And, short of an express "You may come talk to me," or a "Yes" to a request to approach, what constitutes "consent"? Not knowing how to answer these questions, the speaker's only recourse if he or she wants to be sure to avoid criminal sanctions is self-censorship.

The Colorado courts' and legislature's tone-deafness to First Amendment concerns was exemplified when the trial court characterized the speech restricted by § 18-9-122(3) – every day First Amendment activities such as leafleting – as "the offensive and disturbing conduct taking place outside health-care facilities." Pet. App. at 33a. Despite the trial judge's belief, the First Amendment does not allow states to treat non-threatening and non-harassing speech as "offensive and disturbing conduct" subject to criminal sanctions simply because the targeted listener does not want to hear the speech. The Colorado Supreme Court's decision upholding § 18-9-122(3) violates the First Amendment and must be reversed.

ARGUMENT

I. COLORADO REVISED STATUTE § 18-9-122(3) IS TARGETED AT SPEECH AND EXPRESSIVE ACTIVITY IN PUBLIC FORA.

Despite the Colorado Supreme Court's intimations otherwise, § 18-9-122(3) is aimed like a laser beam at speech and other expressive activity in public fora. Section 18-9-122(3) restricts 1) "passing a leaflet or handbill"; 2) "displaying a sign"; and 3) "engaging in oral protest, education, or counseling." This Court repeatedly has recognized that the First Amendment protects all these activities. *See, e.g., Schenck v. Pro-Choice Network, Inc.*, 519 U.S. 357, 377 (1997) (leafleting and commenting on matters of public concern); *United States v. Grace*, 461 U.S. 171, 176-77 (1983); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

That § 18-9-122(3) expressly prohibits "approaching" another person does not change this. This facile distinction, suggested by the Colorado Supreme Court, 973 P.2d at 1257, is too clever by half. Section 18-9-122(3) does not prohibit approaching *qua* approaching. Instead, § 18-9-122(3) prohibits approaching another person only "for the purpose of" engaging in the listed expressive activities. A person within 100 feet of a health-care facility who approaches within eight feet of another to, say, orally lobby that person violates § 18-9-122(3); a person who approaches that same other person for any reason other than engaging in the listed expressive activity does not violate § 18-9-122(3).

As the State and the trial court both conceded, the public streets and sidewalks to which § 18-9-122(3) applies are "quintessential" public fora. *See, e.g.*, Pet. App. at 32(a); JA at 277. This Court's precedent mandates these concessions. As

this Court stated in *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality opinion):

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights, and liberties of citizens.

Thus, "[o]ne who is rightfully on a street open to the public 'carries with him there as elsewhere his constitutional right to express his views in an orderly fashion.'" *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (citations omitted); *see also Schenck*, 519 U.S. at 377 ("speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum"). Section 18-9-122(3) unconstitutionally restricts the right to "express [one's] views in an orderly fashion" on public sidewalks near health-care facilities.

II. SECTION 18-9-122(3) OPERATES AS A PRIOR RESTRAINT ON SPEECH THAT GIVES CITIZEN CENSORS THE UNBRIDLED DISCRETION TO RESTRICT SPEECH ON PUBLIC SIDEWALKS.

Section 18-9-122(3), by empowering all persons within 100 feet of health-care facilities to refuse consent to speakers' attempts to communicate with them, operates as a prior restraint

on speech. For example, the right to even attempt to hand a person a leaflet depends on that person's consent; if the person does not consent, the leafleter must either halt his efforts or face criminal prosecution. And criminal prosecution lies not on any harm or potential harm the leaflet might cause (for example, the leaflet's threatening nature); it lies simply because the leafleter has dared to attempt to leaflet without obtaining consent. This is the hallmark of a classic prior restraint.

Section 18-19-122(3) throttles expressive activity before it occurs. The statute makes it a crime to "knowingly approach another person within eight feet of such person, unless such other person consents, *for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person* in the public way or sidewalk within a radius of one hundred feet from any entrance door to a health-care facility." Colo. Rev. Stat. § 18-19-122(3) (1998) (emphasis added). The Colorado legislature has placed the state's full police power behind the individual, unchecked decisions of private citizen censors. The mere fact that these censors are private citizens does not place this statute beyond constitutional scrutiny. As this Court has held, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966); *cf. Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997).

Section 18-19-122(3) does exactly what *Evans* forbids: it empowers private individuals, backed by the force of law, to censor protected expressive activity in a manner that would be forbidden to government officials. Rather than just being able to walk away from unwanted speech, these citizen censors have the authority to criminalize the mere attempt to engage in protected expressive activity within eight feet of them.

"While '[p]rior restraints are not unconstitutional *per se* . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (omissions in original) (citation omitted). Prior restraints bear this heavy burden because of a "theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

The prior restraint created by § 18-9-122(3) violates the First Amendment in three ways. First, § 18-9-122(3) vests unbridled discretion in the citizen censors it empowers. Second, § 18-9-122(3) does not limit the time in which citizen censors must act to deny consent. Finally, § 18-9-122(3) does not contain the procedural safeguards required for a licensing scheme.

A. Section 18-9-122(3) Vests Unbridled Discretion in Citizen Censors.

"[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide its licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Section 18-9-122(3) provides no standards to guide the citizen censors' decisions.

As this Court has noted, unbridled discretion is dangerous because exercising this discretion can result in censorship. *FW/PBS, Inc.*, 493 U.S. at 225-26. And in the case of § 18-9-122(3), the censorship is likely to be content-based and viewpoint-based. The Colorado legislature tacitly acknowledged this likelihood when it stated that a person's "right to protest or counsel *against* certain *medical procedures* must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner. . . ." Colo. Rev. Stat. § 18-9-122(1) (1993) (emphasis added). Evidently, the Colorado legislature anticipated that the discretion it was granting to the citizen censors created by § 18-9-122(3) would be used to silence persons protesting *against certain medical procedures*. Such censorship is both content-based (speech concerning certain medical procedures) and viewpoint-based (speech against certain medical procedures).

Section 18-9-122(3) places the State's full police power behind the citizen censors' decisions and provides no guidelines by which to make those decisions. Consent to approach can be refused for any reason. Placing the power to criminalize speech in the hands of people who happen to be within 100 feet of a health-care facility creates a variation of the heckler's veto:

a heckler's license. In the past, this Court has refused to interpret a federal statute so narrowly that the construction would "confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech. . . ." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (citation omitted). If government cannot confer a heckler's veto on those objecting to indecent speech, certainly Colorado cannot confer a heckler's license on those objecting to normal conversation and expressive activity on a public sidewalk in front of a health-care facility.

B. Section 18-9-122(3) Imposes no Time Limit for Consenting.

Another evil a system of prior restraint must avoid is a lack of a limit on the "time within which the decision maker must issue the license." *FW/PBS, Inc.*, 493 U.S. at 226. Section 18-9-122(3) possesses this evil as well. The statute imposes no time limit on when a citizen censor must decide. Thus, protected expressive activity is prohibited indefinitely.

In *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781 (1988), this Court stated that the delay caused by a licensing scheme regarding professional fundraisers "compel[led] the speaker's silence." *Riley*, 487 U.S. at 802. Under those circumstances, the "licensing provision [could not] stand." *Id.* The same is true of § 18-9-122(3). It cannot stand because it allows citizen censors to compel silence indefinitely.

C. Section 18-9-122(3) Lacks any Other Procedural Safeguards.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that a film licensing scheme was invalid because it did not contain adequate procedural safeguards. *Id.* at 60. The Court identified three necessary safeguards: first, the censor must prove that the expression is unprotected; second, before judicial review, restraint must be limited to maintaining the status quo; and third, any procedure must include a "prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* at 58-59.

Section 18-9-122(3) contains none of these procedural safeguards. To the contrary, the citizen censors bear no burden of showing that the speech they wish to prohibit is unprotected, and the deterrent effect of the licensing scheme is not minimized by prompt final judicial decision. The citizen censors possess unbridled discretion to censor protected expressive activity absent any time limit or procedural safeguard. Section 18-9-122(3) is thus an unconstitutional prior restraint on First Amendment protected activity.

III. SECTION 18-9-122(3) IS NOT NARROWLY TAILORED BECAUSE IT TARGETS AND ELIMINATES MUCH MORE THAN CONDUCT THAT IMPEDES ACCESS TO COLORADO HEALTH CARE FACILITIES.

Even if § 18-9-122(3) is not a prior restraint of speech, the statute still unconstitutionally restricts far more speech than is

necessary to serve Colorado's ostensible goal of ensuring access to health care facilities. Section 18-9-122(3) is not a narrowly tailored time, place, and manner restriction; rather, it is a blunderbuss restriction that effectively prevents both quiet communication at a normal conversational distance and leafleting, both "classic forms of speech that lie at the heart of the First Amendment." *Schenck v. Pro-Choice Network, Inc.*, 519 U.S. 357, 377 (1997). Nothing about these two constitutionally-protected activities poses an inherent threat to the government's goal of ensuring unimpeded access to Colorado medical facilities.

A generally applicable ordinance imposing time, place and manner restrictions passes scrutiny under the First Amendment only when it is "justified without reference to the content of the regulated speech, . . . [is] narrowly tailored to serve a significant government interest, and . . . leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Narrow tailoring requires that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799. A law is narrowly tailored only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted).

Even assuming the time, place, and manner standard is the proper standard to apply, § 18-9-122(3) fails that standard. Section 18-9-122(3) imposes criminal liability on anyone within 100 feet of the entrance door to a health-care facility who, without first obtaining permission to do so, approaches within

eight feet of *any* other person (not just those trying to enter the facility), to pass a leaflet to, display a sign to, or direct oral protest, counseling or education to that other person. Not only does § 18-9-122(3) eliminate *much more* than "the exact source of evil it seeks to remedy," the statute actually has very little to do with the exact source of evil the Colorado legislature targeted. Section 18-9-122(3) cannot even be called "loosely tailored." It is akin to performing surgery with a chainsaw.

A. Section 18-9-122(3) Effectively Eliminates, Within 100 Feet of Colorado Health-Care Facilities, All Leafleting, A First Amendment Activity Which In No Way Threatens Any Significant Government Interest.

The right to distribute leaflets and pamphlets promoting opinions on public issues occupies a cherished position in the history of First Amendment jurisprudence:

> The liberty of the press . . . necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated . . . Liberty of circulating is as essential to that freedom as liberty of publishing.

Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (citations omitted); *see also Schneider v. New Jersey,* 308 U.S. 147, 160

(1939). In both *Schneider* and *Lovell*, this Court struck down ordinances prohibiting the distribution of pamphlets and circulars without a license. In *Schneider*, this Court rejected the argument that those who wished to distribute handbills could do so in places other than streets and alleys. "Streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U.S. at 163.

In *International Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 (1992), this Court struck down a ban on handbilling even though the ban applied in a nonpublic forum. Applying the reasonableness standard of review operative where speech restrictions occur in nonpublic fora, this Court held a ban on leafleting "unreasonable." "It is difficult to point to any problems intrinsic to the act of leafleting that would make it naturally incompatible with the purposes of [the nonpublic forum]." *Id.* at 690 (O'Connor, J., concurring).

In *Schenck v. Pro-Choice Network, Inc.*, 519 U.S. 357 (1997), this Court struck down the portion of an injunction that established floating buffer zones near certain abortion businesses, in part because the injunction prohibited peaceful leafleting. *Id.* at 361. The floating zones were imposed against anti-abortion activists who allegedly obstructed public passages, engaged in harassing conduct, and otherwise persistently disregarded New York criminal laws. *Id.* at 362-66.

The Court explained the operation of the floating zones in *Schenck* as follows: "The floating buffer zones prevent

Defendants -- except for two sidewalk counselors, while they are tolerated by the targeted individual – from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id.* at 377. Observing that these floating buffer zones constituted a "broad prohibition, both because of the type of speech restricted and the nature of the location," the Court held the floating buffer zones unconstitutional. *Id.* at 377. The restrictions operated "in public areas" where speech "is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Id.* (citation omitted).

The eight foot buffer zone imposed by § 18-9-122(3) effectively prevents leafleting and handbilling absent consent. The Colorado Court of Appeals admitted as much when it stated that "with reference to the fact that leafleting may not take place within 100 feet of the entrances to the medical clinic unless consent is given, we view the significant government interest here sufficient to warrant the requirements of the statute." Pet. App. 56a. Once the buffer is invoked, it would be nearly impossible to distribute any leaflet, short of tossing the leaflet to the intended recipient and hoping she catches it. Attempts to pass leaflets to two or more people walking together could be thwarted by one person's refusal to consent, even if the others with him might otherwise at least glance at the material. The First Amendment does not guarantee willing listeners but it does protect the opportunity to win their attention. *See Kovacs v. Cooper,* 336 U.S. 77, 87 (1948).

In this respect, § 18-9-122(3) is not narrowly tailored to further the government's interest in hindering access to health care or preventing threatening or harassing behavior toward incoming patients. Leafleting is not inherently harassing or threatening, and this Court already has rejected the notion that peaceful leafleting is necessarily obstructive. *United States v. Kokinda*, 497 U.S. 720, 734 (1990) ("One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand."). Moreover, § 18-9-122(3) "protects" not just people seeking to enter a health-care facility, but all people who happen to be 100 feet from the facility entrance. And, unlike the individuals subject to the injunction in *Schenck*, the leafleters, § 18-9-122(3) targets need not ever have engaged in threatening or harassing conduct in the course of their expressive activities. No legitimate government interest is furthered in so constraining the First Amendment rights of law-abiding citizens. If a ban on leafleting is unreasonable in a nonpublic forum such as an airport terminal, *see Lee*, 505 U.S. at 690, it is indefensible in a public forum such as the sidewalks outside health-care facilities.

B. Section 18-9-122(3) Suppresses Constitutionally Protected Speech That Poses No Threat to the Government's Interest in Assuring Free Access to Colorado Health Facilities.

Section 18-9-122(3) also is not narrowly tailored because it curtails the speech of all persons within 100 feet of any medical facility in the State of Colorado. It grants unfettered license to all passersby – not just people seeking to enter health care facilities – to censor others' speech for any reason. In

prohibiting demonstrators from approaching within eight feet of all other persons, it effectively eliminates much normal conversational speech and severely curtails protestors' rights to quietly pass on their message to others.

In *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), this Court struck down a portion of an injunction remarkably similar to § 18-9-122(3). The injunction in *Madsen* ordered protesters to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." *Id* at 773. The *Madsen* provision, like the one here, allowed the prospective counselee to control the prospective counselor's opportunity to engage in protected expression. This Court held that the consent requirement alone invalidated the provision: "[I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id at* 774. Unless such a restriction is limited to speech that either is "independently proscribable," such as "'fighting words' or threats," "or is so infused with violence as to be indistinguishable from a threat of physical harm," such a "provision cannot stand." *Id.* In *Madsen*, the Court reaffirmed "'that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" *Id.* (citation omitted).

In *Houston v. Hill*, 482 U.S. 451 (1987), this Court invalidated a municipal ordinance which made it "unlawful for

any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making the arrest." *Id.* at 455. The majority held that the provision was overbroad. Noting that state law had preempted the provisions dealing with assaulting and striking, the Court found that "the enforceable portion of the ordinance deals not with core criminal conduct, but with speech." *Id.* at 460. The Court stated that the freedom "verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state" and found that the ordinance was "not narrowly tailored to prohibit only disorderly conduct or fighting words." *Id.* at 462-63. "[A]lthough we appreciate the difficulties of drafting precise laws, we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *Id.* at 465. This Court concluded: "The Constitution does not allow such speech to be made a crime." *Id.* at 462.

In *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), *on remand from Sabelko v. City of Phoenix*, 519 U.S. 1144 (1997) (mem.), the Court of Appeals for the Ninth Circuit struck down an ordinance that is similar to § 18-9-122(3). The ordinance in *Sabelko* imposed eight foot floating buffer zones around all those who were within 100 feet "of an exterior wall or entryway" of a "health-care facility." The buffer zones only became operative when "invoked." *Id.* In other words, within 100 feet of the facility, a speaker could approach within eight feet of another for purposes of handing a leaflet, engaging in oral advocacy, or displaying signs. The speaker was only

required to withdraw after the person so requested. Thus, under the ordinance, the speaker at least had the opportunity to win the person's attention. *See Kovacs v. Cooper,* 336 U.S. at 87.

After this Court remanded the case to the Ninth Circuit for reconsideration in light of *Schenck*, the Ninth Circuit held that the ordinance was not narrowly tailored. Applying *Schenck*, the Ninth Circuit determined:

> The Phoenix ordinance suffers the same defects as the injunction in Schenck. It contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance. An individual within the access area to a clinic can invoke the eight-foot floating buffer zone, effectively preventing handbilling and normal conversation. Demonstrators who attempt communication with an individual must constantly monitor themselves to ensure that they don't encroach upon that individuals's or another individual's floating buffer zone. Further, the demonstrators are faced with the problem of determining which people within the access area have invoked the protection offered by the buffer zone.

Sabelko, 120 F.3d at 165.

Section 18-9-122(3) does not target precisely proscribable evils. The statute restricts all attempts to speak in a normal conversational tone with any person in those public places within the scope of the statute. The statute does not regulate only contact between speakers and patients or employees of medical facilities (though this still would be overbroad). Instead, anyone who is walking down a public street, within 100

feet of the entrance door to a medical facility, is given the power to restrict whether anyone else may speak, leaflet, or display signs.

Even worse, if a speaker seeks to approach two or more people to communicate with them, any one of them can thwart the attempt by withholding consent, even if his companions do consent. Arguably, a person would not violate § 18-9-122(3) if he approaches two or more people with the intent to communicate with only one of those people (who consents) and that person's companions do not consent. In reality, however, it is unlikely that a person seeking to communicate with one member of a group will not be seeking to communicate with the other members. Moreover, it will likely not be apparent that the speaker is seeking to communicate with only the consenting member. It very well may *appear* to a police officer enforcing the statute that the speaker is violating the statute, which could well lead to the officer arresting the speaker. The speaker may ultimately be found not guilty, but he will have been silenced. To avoid this situation, the safe course for the speaker when confronted with non-consent from other group members will be to avoid the approach altogether -- in other words, self-censorship. Thus, even when a person does not technically violate § 18-9-122(3) by approaching a consenting listener who is accompanied by non-consenting companions, § 18-9-122(3)'s practical effect will be to allow the non-consenting companions to prevent speech with the willing listener.

Like the injunction in *Madsen*, § 18-9-122(3) bars all approaches to patients who withhold consent. Also, as in *Madsen*, the statutory restriction is not limited to proscribable

speech. It restricts peaceful, nonthreatening leafleting, sign displays, and "oral protest," "education," and "counseling." That the buffer zone in this case is eight feet rather than 300 feet as in *Madsen* is immaterial. It is impossible to engage in the kind of quiet, personal counseling that Petitioners conduct from a distance of eight feet. At a distance of eight feet, Petitioners would likely have to shout to be heard above ambient street noise, thereby dramatically reducing, if not eliminating, the possibility that any incoming patient would consent to speak with them.

Section 18-9-122(3) encroaches even further upon protected First Amendment rights than did the ordinance invalidated in *Sabelko*. At least under the *Sabelko* ordinance, a speaker could approach an incoming patient and attempt to win her attention. No such attempt is permitted under § 18-9-122(3). Speakers are relegated to shouting at people from eight feet with only the patently absurd hope that incoming patients will invite someone shouting at them to draw nearer. As in *Sabelko*, demonstrators cannot be expected to precisely and instantaneously calculate an eight foot distance while moving. Further, the demonstrators are faced with the problem of determining whom within the access area has consented to speech and who has invoked the protection offered by the buffer. The statute does not define consent. Thus, the speaker is left to guess whether a silent nod suffices or whether there must be a clear verbal invitation to approach. Faced with the threat of criminal prosecution, speakers will not want to risk the wrong guess. In sum, if the ordinance in *Sabelko* could not survive reconsideration in light of *Schenck*, § 18-9-122(3) should certainly fail.

Section 18-9-122(3) is also substantially broader than the buffer zone struck down in *Schenck*, which was limited to persons "entering or leaving the clinics," 519 U.S. at 377, as well as the "no approach" zone struck down in *Madsen,* which was limited to "person[s] seeking services of the clinic," or patients. 512 U.S. 773. By contrast, § 18-9-122(3) applies to all persons within one hundred feet of a healthcare facility. Although the Colorado Supreme Court suggested that the statute was designed to protect the privacy rights of citizens "entering and leaving Colorado health care facilities," 973 P.2d at 1247-48, the statute contains no such limitation. Section 18-9-122(3) sweeps much wider and includes passersby who are not even traveling to the facility.

In addition, as was true in *Houston v. Hill,* § 18-9-122(3) effectively provides the police with unfettered discretion to arrest demonstrators because they engaged in speech that offended others. In the volatile context of demonstrations outside abortion clinics (or some other health care facilities, for example, a teaching and research hospital which animal rights activists are picketing because of experiments on animals taking place in the hospital), it is all too easy for demonstrators' speech to annoy or offend others. If a demonstrator misjudges eight feet, or a person's consent, § 18-9-122(3) provides police the facile opportunity to arrest demonstrators on manufactured charges fueled primarily by the offense and annoyance of others.

In the Colorado Supreme Court's view, *Schenck* was not dispositive because "*Schenck* involved a judicially created preliminary injunction drawn solely for the parties before the

Court" while "section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly." 973 P.2d at 1254. It is true that this Court has applied different standards of review to injunctions and ordinances. *See Madsen*, 512 U.S. at 765; *but see id.* at 778-779 (Stevens, J., concurring in part and dissenting in part) (explaining why statutes, which are aimed at all citizens, should be subjected to more stringent scrutiny then injunctions, which are aimed only at lawbreakers to remedy and prevent violations of law). But it is absurd to suggest that *Madsen* permits the legislative branch to squash more First Amendment rights than the judicial branch. Whatever the distinction between the two standards of review, nothing in this Court's jurisprudence supports the Colorado court's view that proven lawbreakers have more constitutional rights than law-abiding citizens.

Finally, the chilling effect § 18-9-122(3) had on Petitioners' exercise of their First Amendment rights demonstrates the statute's overbreadth. Before the statute was enacted, Petitioners spoke against human abortion on public sidewalks and ways within 100 feet of the entrances to abortion facilities.[2] They advised women near abortion businesses about alternatives to abortion. They spoke without fear of censorship[3]

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[2]Pet. App. 4, 112-14, 148-49, 151-53.

[3]Pet. App. 4, 112-14, 148-49, 151-53.

or prosecution.[4] When § 18-9-122(3) became law, Petitioners stopped or altered their activities out of fear of prosecution. Simpson completely discontinued his expressive activities within 100 feet of abortion facility entrances.[5] Hill and Himmelmann changed their activities to avoid prosecution.[6] These changes have made their efforts more risky, more difficult, and less effective. They have found it impossible, at times, to remain on the sidewalk, keep at least eight feet away from others and continue to speak, display signs, or otherwise protest or counsel.[7]

The floating buffer zones at issue here are not narrowly tailored to achieve Colorado's interest in "assuring a citizen's access to medical counseling and treatment at Colorado health care facilities." *See* 973 P.2d at 1250. The buffer zones do not "aim specifically at evils within the allowable areas of State control but, on the contrary, sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940). Such a broad ban as the one created by § 18-9-122(3) is not "*necessary* for the maintenance of peace and tranquility on the public sidewalks surrounding the building." *United States v. Grace*, 461 U.S. 171, 182 (1983) (emphasis added).

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[4]Pet. App. 4, 112-14, 148-49, 151-53.

[5]Pet. App. 153.

[6]Pet. App. 114, 149.

[7]Pet. App. 113, 149, 153.

IV. SECTION 18-9-122(3) IS UNCONSTITUTIONALLY VAGUE.

Section 18-9-122(3)'s vagueness exacerbates its over-breadth. This Court repeatedly has struck down laws that are phrased "in terms so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). While all laws must be reasonably clear, laws that regulate or restrict free speech, must satisfy "a more stringent vagueness test." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). *See also Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) ("[t]he general test of vagueness applies with particular force in review of laws dealing with speech"). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801 (internal quotation marks and citations omitted).

On numerous occasions, this Court has delineated the dangers presented by vague laws. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In *Grayned*, this Court cautioned that "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). The Court held that "because we assume that man is free to steer between lawful and unlawful conduct, we insist

that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108. *See also Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (holding vagrancy ordinance unconstitutionally vague because it failed to give fair notice that contemplated conduct was prohibited, and because it encouraged "arbitrary and erratic arrests and convictions."). Where legislation fails to provide such minimal guidelines, it creates "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

In *Schenck*, 519 U.S. 357 (1997), this Court struck down a portion of an injunction imposing a floating buffer zone, in part, because its terms created substantial ambiguity and lack of certainty about how to comply with the injunction and thus created a substantial risk that more speech would be burdened than the injunction prohibited. 519 U.S. at 359.

Section 18-9-122(3) is vague in its use of the terms "knowingly approach," "consent," "protest," "counseling," and "education." That these words are used commonly in the English language does not assist a person of ordinary intelligence in discerning what the statute permits and what it prohibits. For example, the statutory term "knowingly approach" presents a would-be speaker with his or her first dilemma. While the state court construction of "knowingly approach" avoids inadvertent violations caused by a third party, it does not answer the question of what constitutes the *actus reus* requirement, "approaches." The Colorado Supreme Court held that a speaker could stand still and engage in a full range

of expressive activities. The question remains, however, whether extending a hand to a passerby to give him a leaflet is "approaching"? What if a speaker bends or leans toward a person while keeping his feet in place?

Section 18-9-122(3) also prohibits approaching within eight feet of a person for the purpose of protest, education, and counseling. The words "education," and "counseling" alone include expression of almost every stripe imaginable. Any expression that conveys information unknown to the recipient is arguably "education." How can a speaker be expected to know in advance what information a person possesses? Suppose, for example, that a speaker approaches within eight feet of a person to inform him that the facility performs laboratory experiments on animals. If the person is not aware of that fact, will the speaker have engaged in "education" under the statute? If the person was previously aware of the health facility's experiments, is the statute not violated? The term "counseling" is similarly vague. Is "please, don't experiment on animals" counseling or a simple plea? Or, is it a protest?

Finally, it is unclear what constitutes "consent." Does "consent" mean "to be of the same mind or opinion,"American Heritage Dictionary 312 (2d College ed. 1991), or does "consent" mean a passive acquiescence? *Id.* There are an infinite number of ambiguous utterances and non-verbal signs. And what of those who do not respond to a request for permission to approach? Is nonresponsiveness the legal equivalent of permission or denial? What if a leafleter approaches two people walking together and receives consent from one but not the other? Whose response controls the

leafleter's right to approach? It can even be unclear whether a person's nod is addressed to the speaker or to the person's companion. Given the minimal movement arguably necessary to "approach," coupled with the ambiguity surrounding what constitutes "consent," the only way to safely comply with the statute is to stand perfectly still.

Section 18-9-122(3) creates substantial uncertainty about how to comply with its terms. All the uncertainty surrounding the meaning of the statute's terms will certainly deter speakers from approaching because the price of misunderstanding is criminal prosecution. Section 18-9-122(3) subjects speakers to criminal prosecution for doing nothing more than misunderstanding a verbal or nonverbal indication. Section 18-9-122(3) also provides the police with discretion to make arbitrary arrests. If the police do not like a speaker's message or his tie for that matter, they can trump up charges that a speaker approached a bystander for the purpose of leafleting without that person's "consent." Similarly, § 18-9-122(3)'s vagueness creates the potential for convictions that are inconsistent throughout the state. The statute fails to give "fair warning as to what is prohibited" and does not "'define[] boundaries sufficiently distinct' for citizens, policemen, juries, and appellate judges." *Grayned*, 408 U.S. at 114.

Section 18-9-122(3) imposes vague prohibitions, forcing Petitioners to risk charges or censor their speech to avoid them. Section 18-9-122(3) leaves enforcement to the unfettered discretion of private citizens by defining criminal speech according to the *ad hoc* judgments of private citizens. Free speech must not be left to the good will of others; otherwise,

"the free dissemination of ideas [will be] the loser." *Smith v. California*, 361 U.S. 147, 149 (1959).

CONCLUSION

Section 18-9-122(3) is a vague, overbroad prior restraint on every day expressive activity on public sidewalks that certainly "abridges the freedom of speech." This Court should reverse the Colorado Supreme Court's judgment in this case.

Respectfully submitted,

David N. Ventker, Esq.
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
Attorneys for Amicus Curiae People for The Ethical Treatment of Animals, Inc.

MOTION FILED
NOV 1 2 1999

(9)

No. 98-1856

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

LEILA HILL, ET AL., PETITIONERS

v.

COLORADO, RESPONDENT

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF COLORADO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN IN SUPPORT OF NEITHER PARTY

ALAN ERNEST
COUNSEL

P.O. BOX 4041
RIO RICO, AZ 85648
(520) 281-7513

38 pp

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Interest of *Amicus Curiae*

The *amicus curiae* brief, which does not support either party, defends the constitutional right to life of the unborn which the parties have not done.

Argument

The *amicus curiae* proves that the U.S. Constitution's universal guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn. Thus the Court must not only overrule *Roe v. Wade*, 410 US. 113 (1973), it must rule that State and federal governments have a duty to protect unborn life.

This disposes of all issues in this case.

Consent to File

Neither petitioners nor respondent gave written consent to file this *amicus curiae* brief.

Conclusion

The U.S. Constitution's universal guarantee of life to "any person" is America's most important legal right. The lives of tens of millions of children depend on their being permitted to present all relevant evidence and arguments to prove that the Constitution's universal guarantee of life to "any person" does include the unborn.

Alan Ernest
Counsel

No. 98-1856

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INTEREST OF *AMICUS CURIAE*

The *amicus* defends the right to life of the unborn.

SUMMARY OF ARGUMENT

The Constitution's guarantee of life to "any person," made in its Fourteenth Amendment, does include the unborn.[1]

ARGUMENT

I.

THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The Declaration of Independence announced that reverence for life is America's founding principle. It said that all men are created equal, all are endowed by their Creator with an unalienable right to life, and the purpose of government is to protect the life of everyone.

America's faith is that if we will follow our reverence for life wherever it may lead, then a future of more abundant life, which we can all look forward to with hope, will unfold before us.

On the other hand, in *The Federalist* No. 10, James Madison warned that the primitive idea that some can gain by harming others had ruined all democracies known to history. And today, the lethal inventions of science have made reverence for life the only way to the future.

A. On Its Face, The Constitution's Guarantee Of Life To "Any Person" Does Include The Unborn.

This guarantee of life to everyone was incorporated into the U.S. Constitution. The 14th Amendment's guarantee of life reads: "(N)or shall any State deprive ***any person*** of life...

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[1] *See also* Alan Ernest, *Mass Murder Is Liberty: How The United States Is Ruled By The Decree MASS MURDER IS LIBERTY* 20-73 (1998).

Rule 37.6 disclosure: Counsel authored the whole *amicus curiae* brief; no monetary contributors are required to be identified.

without due process of law." (emphasis added)

The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to prohibit officials making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then *Roe v. Wade* "collapses," because the lives of the unborn would be "guaranteed" by the Constitution.[2] But the Court implied that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[3] Thus the Court hit the Constitution head-on, directly defied its express prohibition of extermination, and condemned to death those victims whom the Constitution, by its plain words, endeavors to preserve.

The words "any person" are the two most important words ever written into law because they protect the lives of everybody from extermination, and they summarize America's unique contribution to civilization. As Abraham Lincoln said, what made America great was the promise "that *all* should have an equal chance."[4]

The words "any person" are the words which guarantee that equal chance to live to *all*. They stand as the supreme political achievement of the human race, the prize of millenniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support *Roe v. Wade*. But its words say "any person," without any exceptions.

The Court ruled that the words "any person" included Chinese aliens, merely saying the words are "universal in their application, to all persons…without regard to any differences." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

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[2] *Roe v. Wade*, 410 U.S. 113, 156-157 (1973).

[3] *Id.*, at 158.

[4] Abraham Lincoln, 4 *The Collected Works of Abraham Lincoln* 240 (R. Basler ed. 1953). (emphasis in text)

In 1975, the Federal Constitutional Court of West Germany held that the words in its Constitution, "Everybody has the right to life," did include the unborn. The court explained that the word "everybody" is universal.[5]

But in *Roe v. Wade*, the Court ignored the letter of the law. Instead the Court focused on the isolated word "person," and ignored its modifier "any." Yet "any" is the word which means "all," and extends the right to life to everyone without any exceptions.

By reading the universal guarantee of life to "any person" as if it were merely a guarantee to "some persons," the Court did the most forbidden thing and reduced the most important law in history to nothing.

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions. On their face the universal words "any person" do include the unborn.

B. The Spirit Of The Law Proves That The Constitution's Guarantee Of Life To "Any Person" Does Include The Unborn.

Roe v. Wade violates the spirit of the law, as well as its letter. The Court itself ruled that the Declaration of Independence is the spirit of the Fourteenth Amendment.[6]

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[5] "No distinction can be made among the several stages of developing life before birth, or between prenatal or postnatal life." The court's opinion is reported in R. Destro, *Abortion and the Constitution: The Need For A Life Protective Amendment*, 63 Cal. L. Rev. at 1341-51 (1975).

[6] *Gulf, Colo. & S. Ry v. Ellis*, 165 U.S. at 159-160 (1896):

> "The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life…." While such declaration of principles may not have the force of organic law…yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty

There is no real medical dispute that the unborn have been created and are alive.[7] Reading the letter of the Constitution, its guarantee of life to "any person," in the spirit that ***all*** are "created equal," and ***all*** shall get their chance to live, proves that the words "any person" do include the unborn.

C. History Confirms That The Constitution's Guarantee Of Life To "Any Person" Does Include The Unborn.

In addition to the letter and spirit of the law, the universal embrace of this guarantee of life to "any person" is also evident from its history.

The last time the Court implied an exception to the words "any person" was *Dred Scott v. Sandford,* 19 How. 393 (1857). There the Court ruled that the phrase in the Declaration of Independence, "all men are created equal," did not include black persons; the words "any person," as used in the Fifth Amendment, did not include black persons; there was a constitutional right to own a slave ("the right of property in a slave is distinctly and expressly affirmed in the Constitution"); Congress could not prohibit slavery in the territories; people were free to choose whether or not to own slaves; and black persons could not sue in federal courts to see if they were slave or free.

Abraham Lincoln opposed *Dred Scott*. If officials can say all men are created equal except black men, he asked "where will it stop?" If officials can say the Declaration does not include black persons, Lincoln argued that they can say it does not include any other person. He claimed that *Dred Scott* was based on "falsehood."[8] He alleged a conspiracy by the U.S. Supreme Court, two U.S. Presidents, and leading members of

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rests more imperatively upon the courts than...to secure the equality of rights which is the foundation of free government."

[7] The uncontested medical evidence in the Texas brief in *Roe v. Wade* showed the fetal heart begins "pulsations at 24 days," and "brain waves have been noted at 43 days," and the unborn child is "alive."

[8] A. Lincoln, *2 The Collected Works of Abraham Lincoln* 495 (1953).

Congress to overturn the U.S. Constitution and to impose a slave empire on America.[9]

Lincoln said he would not obey *Dred Scott*. Citing both Thomas Jefferson and Andrew Jackson as authority,[10] he said the president swears an oath to obey the Constitution as he understands it, and not as it was understood by the Supreme Court. If the president were bound by *Dred Scott*, Lincoln explained in his Inaugural Address, "the people will have ceased, to be their own rulers...."[11]

Dred Scott triggered a civil war. Various States withdrew from the Union rather than be deprived of their constitutional right to own a slave, as decreed by the Court. President Lincoln defied the Court's *Dred Scott* decision that there was a constitutional right to own a slave because he emancipated the slaves and declared them to be "forever free."[12] He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the proposition that "all men are created equal" could long endure.

The framers intended the 14th Amendment to rededicate America to its original proposition. One of its framers said:

> It establishes equality before the law, and it gives to the humblest...the most despised...the same protection before the law as it gives to the most powerful....Without

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[9] *Id.*, at 461-469, 521.

[10] *Id.*, at 402, 516-17.

[11] A. Lincoln, 4 *The Collected Works of Abraham Lincoln* 268 (1953).

[12] A. Lincoln, 6 *The Collected Works of Abraham Lincoln* 28-30 (1953). All constitutional rights suspended during wartime are automatically reinstated after the war is over. If Lincoln had believed that the president was bound by the Court's decision in *Dred Scott*, that there was a constitutional right to own a slave, he could only have freed slaves for the war's duration - not forever. But Lincoln rejected the Court's claim that there was a constitutional right to own a slave, and he proclaimed the slaves to be "forever free."

this…there is no republican government.[13]

The framers of the Fourteenth Amendment learned from *Dred Scott*. They said the Supreme Court must never again imply exceptions to the words "any person." They employed the universal words most suited for this purpose.

And by the middle of the 19th century, medical science had proved that an unborn child was alive throughout gestation, and there was no time during gestation when science could draw a line and say the unborn were not alive. By the time the Fourteenth Amendment was adopted in 1868, the vast majority of States had already enacted criminal abortion laws to protect all stages of unborn life, and within a few years such laws were universal.

The history of these criminal abortion laws shows that the framers and adopters of the Fourteenth Amendment intended its universal guarantee of life to "any person" to mean what it says, and to include the unborn the same as everyone else.

By merely changing the names of the victims, the Court repeats the *Dred Scott* disaster. The Court repudiates a major point of the Civil War and the Fourteenth Amendment: that judges would never again be at liberty, as in *Dred Scott*, to convulse society by implying more exceptions to the words "any person." The Court claims that without one word of explanation the framers intended their guarantee of life to "any person" to sweep away all their abortion statutes and make the killings, which they said were criminal, into "liberty." And the Court amends the Declaration of Independence to read "all men are created equal, except those created to be killed." And the Court claims it can decree who was created to be killed.

The Court did the most forbidden thing: it defied the U.S. Constitution's guarantee of life to "any person" and decreed extermination in violation of criminal statutes to be legal.

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[13] Rep. Jacob Howard, quoted in B. Schwartz, 1 *Statutory History of the United States: Civil Rights* 262 (1970).

The Fourteenth Amendment's letter, spirit and history prove that its universal guarantee of life to "any person" does include the unborn.

II.
ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

A.
Roe v. Wade Criminally Defied The Constitution's Guarantee Of Life To "Any Person" Because The Court Decreed Killings To Be "Liberty" Which The People Had Defined To Be "Murder." In Effect, The Court Decreed "Mass Murder Is Liberty."

When *Roe v. Wade* was decided in 1973, an abortion was murder if the child was "born alive." A child could be born alive during second or third trimester abortions. Indeed, the State of Georgia forewarned the Court that certain abortions were "murder."[14] But the Court scorned that warning and decreed those very killings to be "liberty."[15]

In 1976, a physician explained to Congress that *Roe v. Wade* permitted second trimester hysterotomy abortions and children killed by this abortion can be "born alive":

> With few exceptions, babies aborted by this will all move, will all breathe, and some will cry…. Almost all were **born alive**.[16] (emphasis added)

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[14] *Doe v. Bolton*, 410 U.S. 179 (1973), Brief for Appellees 52-53.

[15] *Roe v. Wade*, 410 U.S. 113, 153 (1973). The Court claimed that a right to abortion was included in the "concept of personal liberty."

[16] Testimony of Dr. J.C. Willke, M.D., and Barbara Willke, 1 *Hearings on Constitutional Amendments on Abortion,* Before subcomm. On Civil and Constitutional Rights, of the House Comm. Of the Judiciary, 94th Cong., 2d Sess., at 397 (1976).

The physician showed Congress this photograph of a child killed by a salt poisoning abortion:

If the Court canot lawfully decree murder to be liberty, about 3 million abortions can be investigated as murders

The physician testified that this method could also result in a child being "born still alive."

For almost four centuries Americans had defined such killings to be "murder." But in 1973 the Court decreed such killings to be "liberty."

The Court also decreed a constitutional right to third trimester abortions to preserve the mother's "health," in effect, abortion on demand right up to birth.[17] Of course, for

[17] *Doe v. Bolton*, 410 U.S. 179 (1973). With no precedent in law or medicine, the Court decreed that abortions could be performed in the 3rd trimester to protect the woman's "health," which the Court ruled included "all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well being of the patient." Few abortions could be prosecuted as criminal under this revolutionary test.

almost four centuries those killings (not necessary to save the mother's life) were murder if the child were "born alive."

And by 1973, States had commonly decided that in the third trimester a child need not be "born alive" but was a human being within their homicide or murder statutes if the child were killed "in the process of being born."[18] The Court also decreed those murders to be liberty. Indeed under *Roe v. Wade*, doctors kill children in the very process of being born.

But if the Court cannot lawfully decree these murders to be liberty, then we have the new reckoning. And, as the new millennium begins, about three million abortions can be investigated as murders.[19]

1. The Court Decreed Killings To Be "Liberty" Which Americans Had Defined To Be "Murder" Since Earliest Colonial Times.

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion, in which a "quick" (about 4 months gestation) child died after being "born alive," to be "murder."[20] Even if not yet viable, if the child was "born alive," Coke (the standard 17th century legal authority) condemned the abortion as "so horrible an offense" and "this is murder."[21]

Today Coke's work is an indispensable dictionary for de-

[18] *People v. Chavez*, 77 Cal. App. 2d 621, 626 (1947). Such abortions are now commonly called "partial-birth abortions" where doctors kill children who are in the process of being born.

[19] About 10% of all abortions each year are 2nd or 3rd trimester abortions. The Washington Post, April 26, 1985, A11. Most 2nd and 3rd trimester abortion procedures can result in a child "born alive."

[20] Coke, 3 *Institutes* 50; Hawkins, 1 *Hawkins* Ch. 13, s. 16; Blackstone, 4 *Bl. Com.* 198.

[21] Coke, 3 *Institutes* 50.

fining the foundation of American liberty, such as distinguishing between liberty and murder.[22] (Today all Americans must rely on these same bedrock legal authorities, as set out for the unborn, to prevent their own extermination from being called liberty. If these authorities cannot protect the unborn, then they cannot protect any other group of persons.)

The English writers cited this as the correct statement of the law.[23] And English courts followed this law.[24]

The common law was the law of the land in colonial America. By allowing second and third trimester abortions, the Court decreed killings to be "liberty" which Americans had defined to be "murder" since earliest colonial times.

2. The Court Decreed Killings To Be "Liberty" Which The Framers And Adopters Of The Fourteenth Amendment Defined To Be "Murder."

The common law is the dictionary which American courts use to construe the State and federal homicide statutes.[25]

By the time the Fourteenth Amendment was adopted in 1868, American legal authorities and State supreme courts had long followed the common law rule that second and third trimester abortions were murder if the child were born alive. And viability was irrelevant. If death were caused by the child being too immature to survive outside the womb, the abortion

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[22] Jefferson wrote that Coke's *Institutes* were "the fundamental code of English law." "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied.... It may still be considered as the fundamental code of English law." T. Jefferson, 14 *The Writings of Thomas Jefferson* 57 (1907). Jefferson served on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

[23] J. F. Archbold, 1 *Complete Treatise on Criminal Procedure, Pleading and Evidence* 783 (Waterman Am. ed. 7th ed. 1860); W.O. Russell, 1 *A Treatise on Crimes and Misdemeanors* 671-672 (4th ed. 1865).

[24] *Regina v. West,* 2 C & K 784 (1848).

[25] *Clarke v. State*, 117 Ala. 1 (1898); *Hamilton v. United States*, 26 App. D.C. 382 (1905).

was murder.

In 1859 the American Medical Association reported the law of murder which existed throughout the United States:

> If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of ***murder***.[26] (emphasis added)

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[27] This definition of murder was approved by the preeminent legal writers of the 19th century,[28] and it was adopted by State supreme courts.[29] It was still the law in 1973.[30] In 1975 the New Jersey courts applied this law to an unviable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, *Institutes* 58 (1648).[31]

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[26] Reported in A. S. Taylor, *A Manual of Medical Jurisprudence* 462 (6th ed. 1866). He described the AMA's report as "a complete and comprehensive exhibit of laws of each of the United States." *Id.*, at 460.

[27] J. P. Bishop, 2 *Commentaries on the Criminal Law* 365 (4th ed. 1868); A. S. Taylor, *supra* note 26, at 462, 517 (1866).

[28] F. Wharton, *A Treatise on the Law of Homicide in the United States* 93 (1855); Bishop, *supra* note 27; Taylor, *supra* note 26.

[29] *Clarke v. State*, 117 Ala. 1 (1898); *Watson v. State*, 117 A 2d 549 (1955); *Porter v. Lassiter*, 87 S. E. 2d 100 (1955); *Bennett v. State*, 377 P 2d 634 (1963); *State v. Anderson*, 343 A 2d 505 (1975); *People v. Chavez* 176 P. 2d 92 (1947); *Singleton v. State*, 35 So 2d 375 (1948).

[30] 2 L. Burdick, *The Law of Crime* 156 (1946); 1 *Wharton's Criminal Law and Procedure* 434 (12th ed. 1957); R. Perkins, *Criminal Law* 30 (2d ed. 1969).

[31] *State v. Anderson*, 343 A. 2d 505, 508 (1975), *affirmed* 413 A. 2d 611 (1980). The court rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." *Id.* at 615.

For almost four centuries governments came and went in America, but this law of murder endured as the law of the land - showing that some things are far deeper than mere governments and go to the very heart of how humans define themselves and what they reach to be. And this law is binding on the U.S. Supreme Court.[32]

In *Roe v. Wade* the Court ruled that States could not protect unborn life until the third trimester which the Court set at viability, "about 7 months."[33] But due to the Court's revolutionary definition of the mother's "health," the Court effectively allowed abortions even as the child was being born. Thus the Court decreed second and third trimester abortions to be "liberty" which the framers and adopters of the Fourteenth Amendment had defined to be "murder."

3. The U.S. Supreme Court And The U.S. Government Claim Power To Decree The Mass Murder Of Jews, Or Anyone Else, To Be Liberty.

Of course, if the U.S. Supreme Court can decree the mass murder of some persons to be liberty, it can decree the mass murder of anybody to be liberty.

Indeed, the U.S. Supreme Court was accused in U.S. District Courts of mass murder on the grounds that Justices cannot lawfully decree mass murder to be liberty. The U.S. Government defended its Supreme Court by expressly claiming the Court must be obeyed even if it decrees the mass murder of Jews, or anyone else, to be liberty. An incredulous U.S. District Judge asked the U.S. Government:

> **[U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in *Roe v. Wade* took a discrete group of entities and said that these entities have no right to live, and thus may be killed.... And he said if you take *Roe v. Wade* and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.**
>
> **Would you argue stare decisis to me if, under *Roe v. Wade*, at the whim of neighbors Jews could be put to death?**
>
> **[U.S. Govt. Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.[34]**

As children were being killed in defiance of murder statutes, the U.S. District Judge adopted the U.S. Government's claim that he must obey the U.S. Supreme Court even if it decreed mass of murder Jews, or anyone else, to be liberty. And on review, not one single Justice had any objection.[35]

Moreover the Justices were individually accused in a U.S. District Court of mass murder on the grounds that they cannot lawfully decree mass murder to be liberty. Each Justice defended himself or herself by claiming that all lower courts must obey the U.S. Supreme Court "no matter how misguided" its decrees may appear to be.[36]

Thus the U.S. Government and its U.S. Supreme Court

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[32] The Court must accept the construction given by a State to its own statute. *Pollard v. Dwight*, 4 Cranch 421, 429 (1808).

[33] *Roe v. Wade*, 410 U.S. at 160, 163.

[34] *Ernest v. U.S. Attorney for the Eastern District of Virginia and U.S. Attorney General*, U.S. District Court in Richmond, Civ. No. 84-0858, transcript 21-22. The complaint attacked the validity of *Roe v. Wade* on the grounds that Justices cannot lawfully decree mass murder to be liberty, and demanded that the District Judge refuse to obey *Roe v. Wade*.

[35] *Ernest v. U.S. Attorney for the Eastern District of Virginia, and U.S. Attorney General*, cert. denied 475 U.S. 1084 (1986).

[36] *Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General*, U.S. District Court in Alexandria, Civil No. 89-732A, Defendants' Motion to Dismiss 3. The District Court adopted this argument as law by summary decree - refusing to even allow a hearing.

officially claim the power to decree the mass murder of Jews, or anyone else, to be liberty.

4. The U.S. Supreme Court Has Committed Treason To The U.S. Constitution.

Chief Justice John Marshall would have called *Roe v. Wade* "treason to the Constitution." He wrote that the purpose of the Constitution was to control the government, including judges, and the intention of its framers is the law.[37] He later ruled that the Court could not extend the Constitution "to objects not...contemplated by its framers."[38] And the Chief Justice warned that if the Court usurped such power, it would be "treason to the Constitution."[39]

The officials to be controlled are not free to invent a constitution more to their liking. Lawless officials can overthrow a constitution as surely as armed rebels. Indeed President George Washington warned that "change by usurpation" might be convenient, but it was "the customary weapon by which free governments are destroyed."[40]

By defining killings to be "liberty" which the framers had defined to be "murder," the Court exactly extended the Constitution to objects not contemplated by its framers. The Court confronts the nation with the boldest and plainest case of officials committing "treason to the Constitution" which it could encounter.

By merely changing the names of the victims being killed, the U.S. Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. At Nuremberg the Nazi judges claimed they could not be prosecuted for complicity in extermination and murder because "the supreme judge" had decreed the killing of Jews and other minorities to be legal, and they were obligated to obey the decrees of their supreme

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[37] *Marbury v. Madison,* 1 *Cranch* at 176-180 (1803)
[38] *Ogden v. Saunders*, 12 Wheat. at 332 (1827).
[39] *Cohens v. Virginia*, 6 Wheat. at 404 (1821).
[40] G. Washington, 35 *The Writings of George Washington* 229 (1940).

judge.[41] But the United States prosecuted those Nazi judges and other justice officials for obeying their supreme judge.

Now U.S. Officials conspire to impose the same Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg: (1) supreme judges who claim power to decree the mass murder of Jews, or anyone else, to be legal; and (2) officials who claim they must obey such decrees.

When U.S. Officials conspire to impose Nazi doctrines on the United States, no honest person can doubt that these officials have committed treason to the U.S. Constitution.

America has surrendered the promise that everybody has an unalienable right to life and the purpose of government is to protect the life of everyone. Now the lives of all Americans depend on the whim of officials, as in Stalin's Russia or Hitler's Germany.

The Court claims that it must be obeyed when it imposes Nazi doctrines on America.[42]

5. The United States Being Ruled By A Giant Conspiracy To Mass Murder Is the Most Catastrophic Crime In The History of Civilization.

If U.S. Officials cannot lawfully decree mass murder to be liberty, as they officially claim in court, then the United States is now being ruled by a giant conspiracy to mass murder - a conspiracy by the leading U.S. Officials to kill children in defiance of murder statutes.

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[41] *United States v. Altstoetter* [The Justice Case], 3 Trials of War Criminals before the Nuernberg Military Tribunals 1011-1014 (1951). Hitler claimed the emergency provisions of the Weimar Constitution gave him power to act as the supreme judge. As such he decreed the killing of Jews and other minorities to be legal. The Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, because they had acted "within the authority" of the "decrees" of "the supreme judge." *Id.* at 983-85.
[42] *See* notes 35 and 36, *supra.*

America introduced civilization to the idea that reverence for life is the future for the world. Yet America is now ruled by the most corrupt decree which the human mind can even imagine - MASS MURDER IS LIBERTY. The government of the United States knows how to build and use atomic bombs, but it does not know the difference between mass murder and liberty. This is the vision which America now holds out to guide the future of the world. Now we all descend into a terrifying darkness.

B.

Roe v. Wade Criminally Defied The Constitution's Guarantee Of Life To "Any Person" Because The Court Defied The Rulings Of Chief Justice John Marshall And Used A "Guilty Until Proven Innocent" Burden Of Proof To Imply That The Words "Any Person" Do Not Include The Unborn.

The Court used the correct burden of proof when it previously construed the words "any person."[43] But in *Roe v. Wade* the Court reversed the burden of proof for the unborn.

1.

Chief Justice John Marshall told the Court what it must prove in order to imply an exception to express and universal terms in the U.S. Constitution.

As already described, the words "any person" are express and universal, and on their face include the unborn, the same as everybody else. In order to imply an exception to exclude the unborn from the Constitution's guarantee of life, so they can be killed with impunity from criminal laws, the Court

[43] The Court ruled the words "any person" included Chinese aliens ("subjects of the emperor of China") and explained that the words are "universal." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). And the Court was so sure that the words "any person" included "corporations," it refused to allow counsel to argue against it. *Santa Clara v. So. Pac. RR*, 118 U.S. 394, 396 (1886).

must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[44]

And the Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it."[45] The Court must prove that the framers would have changed the Fourteenth Amendment to read: "Nor shall any State deprive any person, **except unborn persons**, of life without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Hitler's Germany. Obviously, the Court must bear the heaviest burden of proof to imply an exception to the Constitution's guarantee of life to "any person" so millions of victims can be killed with impunity from criminal statutes.

Chief Justice Marshall's rules prove that this guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude the unborn. And the framers of the Fourteenth Amendment would not have changed its guarantee of life to read "any person, except the unborn." The people had already enacted criminal statutes to protect the lives of the unborn throughout gestation, and some abortions were murder.

[44] *Sturges v. Crowninshield*, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," Chief Justice Marshall ruled that the Court may not infer an exception unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

[45] *Dartmouth College v. Woodward*, 4 Wheat. 518, 644-45 (1819). When the Constitution uses universal words, the Chief Justice said, "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested the language would have been so varied, as to exclude it, or it would have been made a special exception."

Thus the Constitution's universal guarantee of life to "any person" does include the unborn.

2.

But in *Roe v. Wade* the Court exactly reversed the burdens of proof described by Chief Justice John Marshall.

The Court said that the evidence did not prove "with any ***assurance***"[46] that the guarantee of life to "any person" includes the unborn. But "assurance" means "To make certain and put beyond doubt."[47]

Thus in *Roe v. Wade* the Court assumed that the words "any person" did not include the unborn, and then placed the burden on the unborn to prove beyond doubt that the words "any person" did include the unborn.

When courts use this burden of proof to condemn tens of millions of victims to death, Americans cannot pretend they still have a government of Constitution and laws.

The Court claims it can use this burden of proof to decree the extermination of anyone to be liberty.[48]

C.

Roe v. Wade Criminally Defied The Constitution's Guarantee Of Life To "Any Person" Because The Court Used Criminal Procedures To Conclude That The Words "Any Person" Do Not Include The Unborn.

Roe v. Wade was a mock trial designed to exclude truth.[49] And the Court maintains its killings with mock trials. It refuses to allow counsel to represent the unborn and defend the unborn's right to life. It refuses to allow its false evidence in *Roe v. Wade*, which it used to imply that the words "any

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[46] *Roe v. Wade*, 410 U.S. at 157. (emphasis added)

[47] Black's Law Dictionary (4th ed. 1968).

[48] *See* notes 35 and 36, *supra*.

[49] *See* Court's procedures in Motion To Allow Counsel To Represent Children Unborn And Born Alive, filed herein and incorporated by reference. *See also* Ernest, *supra* note 1, at 45-53.

person" did not include the unborn, to be confronted and cross-examined. It refuses to allow evidence to be presented to show that the Constitution's guarantee of life to "any person" does include the unborn.

The Nuremberg Tribunal cited such procedures as evidence to convict the Nazi judges of complicity in extermination and murder. It said, "Such a mock trial is not a judicial proceeding but a murder."

D.

Roe v. Wade Criminally Defied The Constitution's Guarantee Of Life To "Any Person" Because The Court Fabricated False Evidence To Conclude That The Words "Any Person" Do Not Include The Unborn.

The history of the criminal abortion statutes proves that the framers of the Fourteenth Amendment did not intend its guarantee of life to "any person" to exclude the unborn.

When the Amendment was adopted in 1868, over three-fourths of the ratifying States had already enacted statutes which made abortion at any stage of gestation a crime.[50] Within a few years, these criminal statutes were universal.

The ancient common law supposed that life commenced at "quickening" - when the mother felt the child stir in her womb. But judicial revision makes it impossible for the Court to assert with assurance that the common law in 1868 was any different than the abortion statutes which were supplanting it. As one 19th century Court observed:

> By the ancient common law...as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many

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[50] The statutes are set out in Quay, *Justifiable Abortion, Medical and Legal Foundations*, 49 Geo. L. J. 447-520 (1961).

jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[51]

By 1868, medical science had long rejected the ancient notion that life commenced at "quickening." The abortion statutes reflected the views of medical science that there was no time during gestation when the unborn were not alive.

In view of this history, the Court cannot meet its heavy burden to prove that the framers intended to exclude the unborn from the Fourteenth Amendment's guarantee of life to "any person," so they could be killed for convenience. This legislative history is fatal to *Roe v. Wade*.

Thus the Court needed to rewrite 19th century medicine and law. The Court fabricated the hypothesis that the 19th century abortion statutes were intended to protect only the mothers, not the unborn. This suggested that the American people never intended the lives of the unborn to be protected by law. This hypothesis was fabricated as follows.

1.

The Court first asserted as fact, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." *Roe v. Wade*, 410 U.S. at 148. The Court claimed that abortions in the 19th century, even by physicians, were hazardous to the woman.

The only authority the Court cited to prove its assertion of fact was a 20th century medical history book.[52] But this book

[51] *Lamb v State*, 67 Md. 524 (1887). Some state supreme courts ruled that the common law made abortion at any stage of gestation a crime. *Mills v Comm.*, 13 Pa. 631 (1850); *State v Slagle*, 83 N.C. 544 (1880); *State v Reed*, 45 Ark. 333 (1885).

And those State supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately overruled by their legislatures which made abortion at any stage of pregnancy a crime. *Comm. v. Parker*, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). *State v Cooper*, 22 N.J.L. 52

only described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[53] The Court did not examine even one of these obstetric textbooks. They prove the Court's assertion of fact, "the procedure was a hazardous one for the woman," to be false.

The Court never revealed the hazardous abortion procedure to which it was referring. Actually, the 19th century physicians generally used the ancient method,[54] which one physician traced back 2000 years,[55] and which they described as "perfectly safe" to the woman.

Since abortions by physicians were not hazardous to the mother, the only motivating purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions. Had it been the purpose of the legis-

(1849), was immediately overruled by N.J. Laws at 266 (1849). *Abrahams v Foshee*, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

[52] Haagensen and Lloyd, *A Hundred Years of Medicine* 19 (1943), cited in *Roe v Wade*, 410 U.S. at 148 n.43.

[53] 2 T. Denman, M.D., *An Introduction to the Practice of Midwifery* 96 (1802). Denman was a standard English medical authority. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small matter." A.L.M. Velpeau, M.D., *A Complete Treatise on Midwifery* 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., *The Principles and Practice of Obstetrics* 293 (1864).

[54] Dr. Denman, a standard medical authority in England, wrote in 1802: 'the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 T. Denman M.D., *An Introduction to the Practice of Midwifery* 96-99 (1802).

[55] F. Ramsbotham, M.D., *The Principles and Practice of Obstetric Medicine* 724 (4th ed. 1856).

lators to only protect the mother, then they would have simply required abortions to be performed by physicians.

2.

The Court next asserted as fact, "Abortion mortality was high."[56] The Court cited no authority to support it.

The Court intended this assertion of fact to prove that physicians in the 19th century were killing so many women with abortions that women needed legislation to protect them from the medical profession.

The 19th century obstetric authorities prove this assertion to be false. The obstetric texts show that abortions by physicians were "perfectly safe" to women.

3.

The Court next asserted the conclusion it derived from these two false assertions of fact:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." *Roe v Wade*, supra, at 149.

This is a false inference, drawn from two false assertions of fact.

The evidence shows these abortion statutes were intended to protect the unborn. The 19th century treatises on criminal law stated that the fetus was "a living being immediately after conception" and these abortion statutes were intended to protect the lives of the unborn during all stages of gestation.[57] And State supreme courts ruled that these abortion statutes protected the lives of the unborn.[58] And authors of these statutes said their purpose was to protect the unborn.[59]

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[56] *Roe v. Wade*, 410 U.S. at 149.

[57] 1 F. Wharton, *A Treatise on the Criminal Law of the United States* 656-57 (5th ed. 1861).

[58] *Smith v State*, 33 Me 48 (1851).

[59] *See* Joynes, note 61, *infra*.

But since abortions by physicians were known all over the western world to be safe for women, the motivating purpose of these 19th century abortion statutes could only have been to protect the lives of unborn children from destruction by abortions. Since legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals,[60] it proves that their motivating concern was to protect unborn life.

4.

The Court then concluded, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v. Wade*, 410 U.S. at 158. The Court could not find even one 19th century authority to support this result.

In view of these abortion statutes, the Court cannot prove that the people who framed and adopted the Fourteenth Amendment intended its guarantee of life to "any person" to exclude the unborn, so they could be killed for convenience.

5.

The Court resurrected the ancient view that life begins at "quickening" (about four months gestation) and arbitrarily expanded that to "viability" (about seven months gestation). Yet, by the time the Fourteenth Amendment was adopted, both science and law had rejected the ancient view.

A physician, who helped draft Virginia's 1848 state abortion statute, explained that science had rejected the ancient view that life began at quickening:

> (T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of "quickening" as after it, every well-informed

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[60] "In thirty-four cases of criminal abortion...twenty-two were followed ... by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., *On Criminal Abortion in America* 43 (1860).

physician must yield a ready assent. The old doctrine, once held by medical men...that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science...and now only finds a retreat in the dark and ancient caverns of the common law.

....

The civil rights of the unborn child are perfect from the very commencement of its being.[61]

In 1860 the President of the American Medical Association condemned that ancient common law view as a "barbarous physiology" and urged the States to enact statutes to protect all stages of unborn life:

> "This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 Transactions of American Medical Association 56-7 (1860)

In 1864 America's most eminent professor of obstetric medicine wrote:

> From the moment of fecundation, the new being becomes independent...its individuality is complete.... (T)here is a progressive...advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant... should be equally effectual in securing the life of the embryo from the earliest period of its existence.[62]

[61] L.S. Joynes, M.D., *Foetus in Utero*, Virginia Medical Journal 179-180, 187 (1856).

[62] H. L. Hodge, M.D., *The Principles and Practice of Obstetrics* 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., *Discourse on Life of H.L. Hodge* 20-21 (1872).

But the Court adopted a view of unborn life which 19th century medical science had rejected as "a barbarous physiology," which courts had ruled "never ought to have been the law anywhere,"[63] and which legislatures had condemned as criminal.

In construing the phrase in its constitution, "Everybody has the right to life," the Federal Constitutional Court of West Germany ruled that the word "everybody" did include the unborn because "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life."[64] Thus that court ruled that the State had a duty to protect unborn life.

The medical and legal history show that the framers and adopters of the Fourteenth Amendment made this same conclusion when they guaranteed life to "any person" without any exceptions for the unborn. They decided that unborn life was a progressive advancing from one degree of perfection to another, and there was no time when the unborn were not alive and the law could withdraw its protection.

Chief Justice Marshall ruled that the intention of the framers is the law. So the Constitution's guarantee of life to "any person" does include the unborn.

The Court claims it can fabricate evidence to exclude anyone from the Constitution's guarantee of life to "any person" so they can be killed with impunity from criminal statutes.[65] In effect, the Court claims FALSEHOOD IS TRUTH.

[63] *Mills v. Comm.*, 13 Pa. at 632 (1850).

[64] *See* note 5, *supra*.

[65] *See* notes 35 and 36, *supra*.

E.

Due Process Of Law Has Compelled The U.S. Supreme Court To Confess In Court That It Is Guilty Of Extermination And Murder.

For the **115th time**, the U.S. Supreme Court is accused of defying the Constitution's guarantee of life to "any person" and exterminating millions of victims whom the Constitution endeavors to preserve.

For the **91st time,** the U.S. Supreme Court is accused of mass murder in violation of State and federal statutes.

For the **95th time**, the U.S. Supreme Court is accused of using criminal procedures to effect and maintain its *Roe v. Wade* killings.

But, for a quarter-century, the Court has never attempted to refute the charges. Failure to deny a charge is admissible as a confession that the charge is true.[66]

As Socrates cross-examined at his trial 2400 years ago:

> "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?" And "I may assume that your silence gives consent." *Plato*, 41, 45 (Jowett translation, 1942).

And the Court recognizes this ancient rule:

> "(T)he Court has consistently recognized that…silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." *Baxter v. Palmigiano*, 425 U.S. at 319 (1976).

Under the Court's own rulings, its silence is an admission that the charges are true:

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[66] 4 Wigmore, *Evidence*, Sec. 1071-1073 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." *McCormick on Evidence*, Sec. 161 (Cleary ed., 2d ed., 1972). *See also* Ernest, *supra* note 1, at pages 68-72.

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." *United States v. Hale*, 422 U.S. 171,176 (1975).

The circumstances leave no doubt that the U.S. Supreme Court's silence is a confession that the charges are true.

First, the evidence proves the charges to be true. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact. No denial is possible. As Chief Justice John Marshall wrote, "a fact which has existed cannot be made never to have existed."[67]

Second, the charges were made in court, the place designated by law to hear such accusations. The Justices could not lawfully close their eyes on the evidence because they had a legal duty to refute the charges, if they could. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[68] The Court had a legal duty to fully hear allegations that *Roe v. Wade* was wrongly decided, and to obey the evidence.

Third, the Court's steadfast silence for a quarter-century in the face of scores of accusations is unparalleled in the legal history of the world. The Court itself cited this circumstance as making confession by silence more trustworthy:

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." *United States v. Hale*, 422 U.S. 171, 176 (1975).

Fourth, the evidence showed the United States was being ruled by a giant conspiracy to exterminate and mass murder.

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[67] *Marbury v. Madison*, 1 Cranch 137, 167 (1802).
[68] *Marbury v. Madison*, 1 Cranch 137, 179-180 (1803).

Never in history had it ever been more imperative to deny charges if they were untrue.

And **fifth**, the Justices met the charges in court by claiming they must be obeyed even if they decreed the mass murder of Jews, or anyone else, to be liberty.[69]

A government of laws can permit only one conclusion to be drawn from these facts: the U.S. Supreme Court has confessed in court that the charges are true.

If *Roe v. Wade* is a mistake of law, then all government officials who helped to support the killings can be prosecuted for complicity in extermination and mass murder.

The general rule is that mistake of law is no excuse for breaking the law.[70] The Constitution's *ex post facto* provisions do not apply to judicial decisions which are a mistake of law.[71] The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply in homicide cases, much less national extermination.[72] But even if it did, no reliance on *Roe v. Wade* could be reasonable in view of the above facts. So the law applied at Nuremberg applies here: Obedience to decrees of the supreme judge is no defense to complicity in extermination and mass murder.

Even if the U.S. Supreme Court held a gun to a man's head, and threatened death unless he obeyed *Roe v. Wade*, it would not be a defense to complicity in extermination and murder. As Blackstone wrote, "he ought rather to die himself than escape by the murder of an innocent."

In explaining why the Western democracies bowed to violence and the Nazis got away with monstrous crimes, Winston Churchill merely quoted Machiavelli: "Men avenge slight injuries, but not grave ones." Thus America is now ruled by a giant conspiracy to exterminate and murder.

"Political language," wrote George Orwell, "is designed to make lies sound truthful and murder respectable." In his novel *1984*, Orwell described a tyranny which claimed "Whatever the Party holds to be truth is truth," and defrauded its subjects into obedience with its slogans "FREEDOM IS SLAVERY" and "WAR IS PEACE." This science fiction may appear implausible. Yet for a quarter-century the United States has been ruled by a Court which claims, "Whatever the Court holds to be truth is truth," and maintains obedience with its slogans MASS MURDER IS LIBERTY, FALSEHOOD IS TRUTH, and TREASON IS LAW.

But all that will be swept away. The primitive idea, that some can gain by killing others, has no future. The message of our Declaration of Independence becomes more true every day: reverence for life is the only path to the future. Wherever we are, wherever in the universe our kind may go, our essential thought, the thought necessary for us to exist, will always be reverence for life.

CONCLUSION

Merely overruling *Roe v. Wade* will not remedy the wrong. The Court must proclaim the truth: the U.S. Constitution's universal guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn. State and federal governments have a duty to protect unborn life.

Alan Ernest
Counsel

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[69] *See* notes 35 and 36, *supra.*

[70] R. Perkins, *Criminal Law* 920 (2d ed. 1969). Oliver Wendell Holmes, *The Common Law* 41 (1963).

[71] *Ross v. Oregon*, 227 U.S. 150, 161 (1912).

[72] Model Penal Code, Sec. 2.04 Ignorance or Mistake (Proposed Official Draft 1962) and comments in Model Penal Code, Tentative Draft No. 4, Comments on Sec. 2.04, page 138; R. Perkins, *Criminal Law* 928 (2d ed. 1969).

FILED
NOV 12 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(10)

No. 98-1856

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

LEILA HILL, ET AL., PETITIONERS

v.

COLORADO, RESPONDENT

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF COLORADO

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

ALAN ERNEST
COUNSEL FOR MOVANT

P.O. BOX 4041
RIO RICO, AZ 85648
(520) 281-7513

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the children being killed by *Roe v. Wade*, 410 U.S. 113, as counsel or guardian ad litem. Since there will be no expense to the Court, this is effectively a motion to allow retained counsel.

INTEREST OF COUNSEL

Counsel will prove that the U.S. Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn.

SUMMARY OF ARGUMENT

The unborn have a legal right to be represented by counsel, and to be aided by all the procedures guaranteed by the Constitution, so counsel can prove that the U.S. Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn.

ARGUMENT

I.

THE COURT USED THE MOCK TRIALS TO EFFECT AND MAINTAIN ITS *ROE v. WADE* KILLINGS WHICH THE NUREMBERG TRIBUNAL CONDEMNED AS "NOT A JUDICIAL PROCEEDING BUT A MURDER."[1]

A. The Court Effected And Maintains Its *Roe v. Wade* Killings By Unconstitutionally Refusing To Allow Counsel To Represent The Unborn And Defend Their Constitutional Right To Life.

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[1] The Court's procedures are also described in the book by Alan Ernest, *Mass Murder Is Liberty: How The United States Is Ruled by the Decree* *MASS MURDER IS LIBERTY* 45-53 (1998).

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in *Roe v. Wade*. An original party objected that the unborn should be represented by counsel in the U.S. Supreme Court:

> "(T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth." Petition for Rehearing 5, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

But the Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the Court commenced its killings.

And the Court has maintained its killings by steadfastly refusing to allow counsel to represent the unborn, and defend their right to life under the Constitution.[2]

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[2] *Colautti v. Franklin*, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; *Anders v. Floyd*, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; *Bellotti v. Baird*, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; *Ashcroft v. Freiman*, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied 440 U.S. 941; *United States v. Zbaraz*, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; *Harris v. McRae*, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; *H.L. v. Matheson*, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; *Simopoulos v. Virginia*, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476, motion to allow counsel for the unborn denied 458 U.S. 1104; *Akron Center for Reproductive Health v. Akron*, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; *Diamond v. Charles*, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; *Hartigan v. Zbaraz*, 484 U.S. 171, motion to allow counsel for the unborn denied 479 U.S. 1003; *Webster v. Reproductive Health Services*, 492 U.S. 490, motion to allow counsel for the unborn denied 489 U.S. 106; *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, motion to allow counsel for the unborn denied 493 U.S. 802; *Hodgson v. Minnesota*, 497 U.S. 417,

The unborn have a constitutional right to be represented by counsel to defend their right to life under the U.S. Constitution.[3] Judges who willfully deny this right are guilty of crime.[4] This denial makes *Roe v. Wade* void.

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motion to allow counsel for the unborn denied 492 U.S. 803; *New York v. Sullivan*, 500 U.S. 173, motion to allow counsel for the unborn denied 497 U.S. 1002; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 120 L Ed 2d 674, motion to allow counsel for the unborn denied 117 L Ed 2d 614; *National Organization for Women v. Scheidler*, 126 L Ed 2d 99, motion to allow counsel for the unborn denied 125 L Ed 2d 786 (1993); *Schenck v. Pro-Choice Network of Western New York*, (No. 95-1065), __ L Ed 2d __ (1996), motion to allow counsel to represent the unborn denied ___ L Ed 2d ___ (1995).

[3] Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; and (4) the right to present evidence. *Goldberg v. Kelly*, 397 U.S. 254, 268-271 (1970); *In Re Gault*, 387 U.S. 1 (1967).

Will the Court claim that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S. Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Everyone is entitled to all these procedural protections before any court can decree that their life is not protected by the Constitution, and they can be killed with impunity from criminal statutes.

[4] "Even judges ... could be punished criminally for willful deprivations of constitutional rights." *Imbler v. Pachtman*, 424 U.S. 409 (1976).

B. The Court Effected Its *Roe v. Wade* Killings By Unconstitutionally Refusing To Allow Any Prior Notice Of The Standards, The Burdens Of Proof, Or The Evidence Which It Used To Infer That The Lives Of The Unborn Are Not Protected By The Constitution.

The U.S. District Court in *Roe v. Wade* did not even look to see if the lives of the unborn were protected by the U.S. Constitution. This question was argued for the first time after the case reached the U.S. Supreme Court. Since the Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

In the aftermath of *Dred Scott* and the Civil War, the Fourteenth Amendment was intended to assure the people that the Court could never again convulse the nation by implying another exception to the Constitution's universal guarantee of life and liberty to "any person."[5]

But in 1973, the Court not only defied this long-standing legitimate public expectation and implied another exception to the words "any person," but it also gave the parties no prior notice of the factual and legal basis of its decision.

In particular, the Court gave the parties in *Roe v. Wade* no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to imply that the Fourteenth Amendment's express guarantee of life to "any person" did not include the unborn.

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[5] The history of how *Dred Scott v. Sanford*, 19 How. 393 (1857), triggered the Civil War is outlined in the *amicus curiae* brief filed herein by Legal Defense for Unborn Children at 4-6. *See also* Ernest, *supra* note 1, at 20-29.

In *Dred Scott*, the Court ruled that the words "any person" in the Fifth Amendment did not include black persons, and they could not sue in the Courts of the United States to see if they were free or slave.

The first time the parties had notice was when *Roe v. Wade* was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard **without giving the Appellees notice** or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But the Court refused to allow the original parties to have any prior notice. Thus the Court commenced its killings.

And the Court has maintained its killings despite repeated objections that the unborn had no prior notice in *Roe v. Wade* of the factual and legal bases needed to defend the unborn's right to life under the U.S. Constitution.[7]

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny this right are guilty of crime.[9] This denial makes *Roe v. Wade* void.

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[6] Petition for Rehearing 6, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added)

[7] *See* cases in note 2, *supra*.

[8] *See* note 3, *supra*.

[9] *See* note 4, *supra*.

C. **The Court Effected Its *Roe v. Wade* Killings By Using Unconstitutional Secret Proceedings To Find Evidence To Infer That The Lives Of The Unborn Are Not Protected By The Constitution.**

In *Roe v. Wade*, the Court used secret evidentiary proceedings to find evidence to imply that the Constitution's express guarantee of life to "any person" did not include the unborn. The Court conducted these secret proceedings in its back rooms. The parties were not allowed to be present. No public record was made of these secret proceedings.

The purpose of these secret proceedings was to give the Justices an opportunity to find evidence to conclude that the Constitution's guarantee of life to "any person," an express guarantee in absolute terms, did not mean what it plainly said, and to somehow imply that the unborn were excluded.

An original party objected to these secret proceedings:

> "The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are **unknown to the parties** but which apparently were **extricated from various sources by the Court's diligent research,** which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion…of constitutional stages of fetal growth." Petition for Rehearing 4, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). [emphasis added]

The first time the victims saw the evidence used against them was after *Roe v. Wade* was promulgated and they were already condemned to death. But the Court overruled the party's objection to its secret evidentiary proceedings. Thus the Court commenced its killings.

And the Court has maintained its killings despite repeated objections that it used secret proceedings in *Roe v. Wade*.[10]

[10] *See* cases in note 2, *supra*.

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[11] Judges who willfully deny this right are guilty of crime.[12] This denial makes *Roe v. Wade* void.

D. **The Court Effected And Maintains Its *Roe v. Wade* Killings By Unconstitutionally Refusing To Allow Its False Evidence, Which It Used To Infer That The Lives Of The Unborn Are Not Protected By The Constitution, To Be Confronted And Cross-Examined.**

Since the Court used secret evidentiary proceedings, the original parties had not seen all the evidence which the Court used to imply that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to imply that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, **which facts nevertheless should be subject to refutation and counter-evidence** since they form the foundation of the Court's opinion...of constitutional stages of fetal growth.[13]

But the Court refused to allow its evidence in *Roe v. Wade*, which it used to imply that the lives of the unborn

[11] *See* note 3, *supra*.

[12] *See* note 4, *supra*.

[13] Petition for Rehearing 4, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

were not protected by the U.S. Constitution, to be cross-examined. Thus the Court commenced its killings.

And despite repeated objections that the Court fabricated false evidence in *Roe v. Wade* in order to imply that the Constitution's express guarantee of life to "any person" did not include the unborn, the Court has maintained its killings by steadfastly refusing to allow its evidence to be confronted and cross-examined.[14]

The unborn have a constitutional right to confront and cross-examine the evidence which the Court used to imply that their lives are not protected by the U.S. Constitution.[15] Judges who willfully deny this right are guilty of crime.[16] This denial makes *Roe v. Wade* void.

E. The Court Effected And Maintains Its *Roe v. Wade* Killings By Unconstitutionally Refusing To Allow Evidence To Be Presented On Behalf Of The Unborn To Prove That The Constitution's Guarantee Of Life To "Any Person" Does Include The Unborn.

In *Roe v. Wade*, the Court invented new constitutional standards on the protection of life which the parties did not see until after *Roe v. Wade* was decided. The parties never had opportunity to present evidence under these new standards.

An original party requested "an opportunity to present evidence" under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution.[17]

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[14] *See* cases in note 2, *supra*.

[15] *See* note 3, *supra*.

[16] *See* note 4, *supra*.

[17] Petition for Rehearing at 3 - 6, 8, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) [emphasis added]. The party said:

> We are dealing here with a procedure long considered outlawed and

But the Court refused to allow the party to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the Court commenced its killings.

And the Court has maintained its killings by steadfastly refusing to allow evidence to be presented on behalf of the unborn to prove that their lives are protected by the U.S. Constitution.[18]

> which has suddenly become legal.
>
> ....
>
> The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.
>
> ....
>
> Appellees have had **no opportunity to show by evidence** in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.
>
> ....
>
> With **no opportunity** for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.
>
> ....
>
> In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electro-cardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence.
>
> ....
>
> At any rate, Appellees **should have an opportunity to present evidence** and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.

[18] *See* cases in note 2, *supra*.

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[19] Judges who willfully deny this right are guilty of crime.[20] This denial makes *Roe v. Wade* void.

CONCLUSION ON JUDICIAL PROCEDURES

The Nuremberg Tribunal cited these judicial procedures as part of its evidence to convict Nazi judges of complicity in extermination and murder:

> In many instances they [the accused] were denied the right to introduce evidence, to be confronted by witnesses against them.... They were...denied the right of counsel of their own choice.... (T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them.[21]

The Nuremberg Tribunal said, "Such a mock trial is not a judicial proceeding but a murder."[22]

The Court used procedures to effect and maintain its *Roe v. Wade* killings which were not judicial proceedings but murders.

And the Court claims it can use such mock trials to decree the extermination of Jews, or anyone else, to be liberty.[23]

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[19] *See* note 3, *supra.*

[20] *See* note 4, *supra.*

[21] *United States v. Altstoetter* [The Justice Case], 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-47 (1951).

[22] *Id.*, at 1164.

[23] *See* pages 11-20, *infra;* Ernest, *supra* note 1, at 59-67.

II.
COUNSEL FOR THE UNBORN RAISES ISSUES, NOT RAISED BY THE PARTIES, WHICH DISPOSE OF ALL ISSUES IN THIS CASE.

A. The U.S. Constitution's Guarantee Of Life To "Any Person" Does Include The Unborn.

Counsel will prove that the Constitution's universal guarantee of life to "any person" does include the unborn.[24]

B. The U.S. Supreme Court And Leaders Of The U.S. Government Maintain The *Roe v. Wade* Killings By Conspiring to Impose The Nazi Doctrines On The United States Which The United States Itself Prosecuted As Extermination And Murder At Nuremberg.

By merely changing the names of the victims being killed, the U.S. Supreme Court has duplicated the crimes of "the supreme judge" of Nazi Germany.

At Nuremberg, the Nazi judges claimed they could not be found guilty of complicity in extermination and murder of millions of Jews and other minorities because "the supreme judge" of Nazi Germany had decreed those killings to be legal, and they were required to obey the decrees of "the supreme judge."[25]

Yet the United States prosecuted the Nazi judges and other justice officials for obeying the decrees of their supreme judge. And the Nuremberg Tribunal convicted them with the comment: "The dagger of the assassin was concealed beneath the robe of the jurist."[26]

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[24] *Amicus Curiae* Brief by Legal Defense for Unborn Children at 1-6, filed herein and incorporated by reference. *See also* Ernest, *supra* note 1, at 20-29.

[25] *United State v. Altstoetter*, *supra*, at 983-985, 1011, 1014.

[26] *United States v. Altstoetter*, *supra*, at 985.

The record proves that the U.S. Supreme Court conspires to impose those same Nazi doctrines on America. The Court decreed killings to be "liberty" which the people had defined by their homicide statutes to be "murder."[27] The Court decreed mass murder to be legal, just as "the supreme judge" of Nazi Germany decreed mass murder to be legal. By merely changing the names of the victims, the Court has duplicated the decree of "the supreme judge" of Nazi Germany.

2.

The U.S. Supreme Court was accused in U.S. District Courts of extermination and mass murder on the grounds that Justices cannot lawfully decree extermination or murder to be legal. The U.S. Government defended its Justices by claiming that its Supreme Court must be obeyed "no matter how misguided" its decrees may appear to be. The U.S. Government expressly argued in open court that its Supreme Court must be obeyed even if it decrees the mass murder of Jews, or anyone else, to be liberty. An incredulous U.S. District Judge asked the U.S. Government:

> **[U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in *Roe v. Wade* took a discrete group of entities and said that these entities have no right to live, and thus may be killed.... And he said if you take *Roe v. Wade* and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.**
>
> **Would you argue stare decisis to me if, under *Roe***

[27] *Amicus Curiae* Brief By Legal Defense for Unborn Children, *supra* note 24, at 7-16. *See also* Ernest, *supra* note 1., at 29-37.

> ***v. Wade*, at the whim of neighbors Jews could be put to death?**
>
> **[U.S. Government Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.[28]**

Thus, while children were being killed in defiance of murder statutes, the U.S. Government defended its Justices accused of mass murder by claiming the same Nazi doctrines which the United States itself prosecuted as complicity in extermination and murder at Nuremberg.

It was undisputed that the U.S. Supreme Court decreed killings to be "liberty" which legislatures had defined to be "murder." It was undisputed that the victims were being killed in defiance of murder statutes. Yet the U.S. Government expressly claimed in open court that its Supreme Court must be obeyed even if it decreed the mass murder of Jews, or anyone else, to be liberty.

Although the U.S. District Judge objected that *Roe v. Wade* was "the worst decision by the Supreme Court in the history of the Court," he adopted the U.S. Government's arguments that he must obey the U.S. Supreme Court no matter whom it decreed a liberty to kill.[29]

3.

The petition for review of that decision filed in the U.S. Supreme Court accused it of mass murder:

> For the **67th time**, the U.S. Supreme Court is accused in in its own court with mass murder in violation of State

[28] *Ernest v. United States Attorney for the Eastern District of Virginia and U.S. Attorney General*, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22, cert. denied 475 U.S. 1084 (1986).

[29] Petition for Cert. at A1, *Ernest v. United States Attorney for the Eastern District of Virginia and U.S. Attorney General*, cert. denied without comment, 475 U.S. 1084 (1986).

and federal statutes.[30]

The U.S. Government waived its right to oppose the petition for review, and thus the U.S. Supreme Court was accused in its own Court of extermination and mass murder, and the accusations were unopposed. Yet the Court neither denied that it had decreed mass murder to be liberty, nor objected to the U.S. District Court's ruling that it must obey the U.S. Supreme Court even if it decreed the mass murder of Jews, or anyone else, to be liberty.

If any Justice had believed that the U.S. Supreme Court did not have the power to decree the mass murder of Jews or anyone else to be liberty, the Justice would certainly have noted his or her objection. But no such objection was noted.

This record proves a conspiracy by the executive and judicial departments of the government of the United States to impose the Nazi doctrines on the United States which the United States itself prosecuted as complicity in extermination and murder at Nuremberg. Only the names of the victims being killed have been changed.

4.

Moreover, each Justice of the U.S. Supreme Court was named as a defendant in a civil suit, and accused in a State court of extermination and mass murder on the grounds that Justices cannot lawfully decree extermination or murder to be liberty.[31] The State court was asked to "Declare that there was probable cause to believe that the U.S. Supreme Court had conspired to commit murder" in violation of the State murder law.[32] Such a ruling could have been tantamount to

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[30] *Id.*, at page 50. (emphasis in text)

[31] *Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc.; U.S. Attorney, etc.; U.S. Attorney General*, et al, filed in the Circuit Court of Fairfax, Virginia, Civil No. 90367.

[32] Complaint, *supra* note 31, at page 44.

the start of the criminal prosecution process against the Justices for mass murder.

History had never seen a moment when it was more imperative to meet the charges, and if possible, refute them. The charges were made in court, the place designated by law to hear such charges. The courthouse is the place where anyone, including the most powerful, can be summoned, confronted with the facts, and required to adequately explain, or face the consequences.

But the Justices did not deny that they had decreed killings to be "liberty" which that State had defined to be "murder." Nor did the Justices deny that under *Roe v. Wade*, victims were being killed in defiance of the State's murder statute. Nor did the Justices deny that they had been repeatedly accused of extermination and murder in the U.S. Supreme Court, but they had never attempted to refute the charges. Nor did the Justices deny that they were seeking to impose the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg. To the contrary, this would be their defense.

The U.S. Government removed the case to the U.S. District Court in Alexandria.[33] Even though accused of extermination and mass murder, the Justices did not attempt to show one single allegation in the complaint to be wrong in fact or law. The record shows the charges to be true.

Rather each Justice, through his or her U.S. Government lawyer, claimed that all lower courts must obey the U.S. Supreme Court even if it decreed mass murder to be liberty.[34]

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[33] *Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, et.; U.S. Attorney, etc.; U.S. Attorney General*, in the U.S. District Court in Alexandria, Civil No. 89-732-A.

[34] The Justices claimed that the District Court "is prohibited by stare decisis from granting the relief requested in this action." Although a trial court was asked to find probable cause that the Justices had conspired to commit mass murder, the Justices defended themselves by claiming "a precedent of the [U.S. Supreme] Court must be followed by the lower

And the Justices also claimed that after the U.S. Supreme Court had decreed mass murder to be liberty, the victims being killed in defiance of murder statutes could not challenge the validity of its decree in any court.[35] The U.S. District Judge adopted the Justices' claims as law by summary decree - refusing to hold any hearings, and without showing any of the allegations in the complaint to be wrong in fact or law.

Thus, in defending themselves against accusations of extermination and mass murder, each Justice of the U.S. Supreme Court claimed the power to decree the mass murder of Jews, or anyone else, to be liberty. And this claim is now accepted by the government of the United States - its courts, Congress and president - as the supreme law of the land.

Moreover this has been the steadfast policy of the U.S. Government, asserted in court after court, for about a quarter-century.[36] All the lower judges who have upheld this Court's claim of power to condemn millions to death by decree are accused herein of complicity in extermination, mass murder and treason to the U.S. Constitution.[37]

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federal courts no matter how misguided the judges of those courts may think it to be." *Ernest v. Rehnquist, supra* note 33, Government's Memorandum in Support of Motion to Dismiss at 3.

[35] *Id.*, Government's Memorandum in Support of Motion to Dismiss at 4.

[36] Some of these cases are: U.S. District Court in Alexandria, Civ. No. 89-732; U.S. District Court in Salt Lake City, Civ. No. 85-0026; U.S. District Court in Richmond, Civ. No. 84-0858; U.S. District Court in Portland, Civ. No. 81-0272.

[37] U.S. DISTRICT JUDGES: Albert V. Bryan, Jr.; Emmet R. Cox; Edward T. Gignoux; Harold H. Greene; J. Thomas Greene; William B. Hand; Joseph C. Howard; Martin F. Loughlin; Robert Earl Maxwell; Louis F. Oberdorfer; Raymond J. Pettine; Aubrey E. Robinson, Jr; John J . Sirica; James R. Spencer; James C. Turk; D. Dortch Warriner; Don J. Young. U.S. CIRCUIT JUDGES: D. C. Circuit; David L. Bazelon; Carl McGowan; Roger Robb; George E. MacKinnon; Spotswood Robinson III; J. Skelly Wright; Edward A. Tamm; Malcolm R. Wilkey;

President Bill Clinton has repeatedly rejected pleas to withdraw the U.S. Government's claim, made in numerous courts, that its Supreme Court has the power to decree the mass murder of Jews or anyone else to be legal. President Clinton was informed:

> The general rule is that mistake of law is no excuse for breaking the law. The narrow exception of reasonable reliance on an official judicial opinion, thereafter found to be a mistake of law, does not even apply in homicide cases.
>
> ....
>
> If the U.S. Government's claim [that its Supreme Court has the power to decree the mass murder of Jews or anyone to be liberty and such decrees must be obeyed as the supreme law of the land] turns out to be a mistake of law, and you refuse to repudiate it while victims are actually being killed in defiance of murder statutes, then your acquiescence can implicate you in a national scheme of mass murder. This letter becomes a part of the record of this case as evidence of what you knew, and when you knew it.[38]

First Circuit - Levin H. Campbell; Frank M. Coffin; Hugh H. Bownes; Stephen G. Breyer; Fourth Circuit - Harrison L. Winter; Donald S. Russell; H. Emory Widener, Jr.; Kenneth K . Hall; James D. Phillips, Jr.; Francis D. Murnaghan, Jr.; James M. Sprouse; Sam J. Ervin II; Robert F. Chapman; Eleventh Circuit - John C. Godbold; Paul H. Roney; Gerald B. Tjoflat; James C. Hill; Peter T. Fay; Robert S. Vance; Phyllis A. Kravitch; Frank M. Johnson, Jr.; Albert J. Henderson, Jr.; Joseph W. Hatchett; R. Lanier Anderson, III; Thomas A. Clark. AND the judges in *Roe v. Wade* and *Doe v. Bolton* who decreed a "liberty" to kill the unborn without any investigation to see if their lives were protected by the U.S. Constitution: Circuit Judges Morgan and Goldberg; District Judges Smith, Henderson, Hughes and Taylor.

[38] Letter to President Clinton dated March 31, 1993, certified no. P 867-382-498, received by the White House April 9, 1993.

Although publicly accused of complicity in mass murder, and children were being killed in defiance of murder statutes, President Clinton repeatedly rejected requests to withdraw the U.S. government's claims, and he supported the *Roe v. Wade* killings on numerous occasions.[39]

Thus this president has contributed to this giant conspiracy to kill victims in defiance of murder statutes, and to impose the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg. A jury could find that this amounts to complicity in extermination, murder and treason.

6.

Leaders of the U.S. Congress have also aided this conspiracy.[40] Congress has the constitutional duty to control the federal judiciary. But, as federal courts conspired to decree mass murder to be liberty, to kill children in defiance of murder statutes, and to impose Nazi doctrines on the United States, Congress defied its legal duty to control the federal judiciary.

Leaders of Congress, by acts of commission or omission, helped to maintain the *Roe v. Wade* killings.[41] But for these

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[39] Ernest, *supra* note 1, at 74-81.

[40] The Complaint, *supra* n. 33, at p. 3, alleged that various members of the committees on the Judiciary, whose particular duty was to control the courts, were a part of the conspiracy: "The co-conspirators include ex-Chairman Peter Rodino, Chairman Rep. Jack Brooks, sub-committee chairman Rep. Don Edwards, sub-committee chairman Rep. Robert Kastenmeier; Chairman Sen. Joseph Biden, ex-Chairman Sen. Edward Kennedy. A jury could find this conspiracy to be murder." *See also* Ernest, *supra* note 1, at 82-103.

[41] When the U.S. Congress held hearings on *Roe v. Wade*, it conspired to allow all the false evidence in *Roe v. Wade* to be presented, but refused to allow the rebuttal to be presented. Thus Congress conspired to present false evidence to the nation as if it were the truth. And many leaders of Congress have publicly endorsed the *Roe v. Wade* killings. *See also* Ernest, *supra note* 1, at 82-103.

acts of commission or omission by members of Congress, Nazi doctrines could not have been imposed on America, and the killings could not have proceeded.

Since children are being killed in defiance of murder statutes and others criminal laws, because leaders of Congress refuse to do their constitutional and statutory duty to control the federal judiciary, a jury could find that those leaders of Congress are guilty of complicity in extermination and murder.

7.

A U.S. courthouse has become a place where U.S. Officials conspire to commit extermination and murder, fabricate false evidence to make their killings appear legal, and then maintain their killings decade after decade by conspiring to overthrow the U.S. Constitution and to impose the same Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg.

8.

The evidence show that leaders of the judicial, executive and legislative branches of the government of the United States conspire:

1. to claim the power to decree the extermination and murder of Jews, or anyone else, to be legal;
2. to actually kill victims in violation of murder statutes; and
3. to maintain their killings by supplanting the U.S. Constitution as the supreme law of the land and imposing the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg.

The human mind cannot imagine a plainer or bolder case of U.S. Officials committing treason to the U.S. Constitution.

In 1858 an unknown lawyer named Abraham Lincoln accused the U.S. Supreme Court, two U.S. Presidents, and

leaders of the U.S. Congress of conspiring to overthrow the U.S. Constitution and to impose a slave empire on America.

In 1998 a book reviewed the evidence presented in this application, and asked:

> Has the U.S. Supreme Court committed mass murder?
> Have four U.S. Presidents committed mass murder?
> Have leaders of the U.S. Congress committed mass murder? [42]

These questions are now before the public, and counsel submits that the search for truth will surely continue until these questions are correctly answered.

CONCLUSION

The Court is moved to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution, and to prove that the Constitution's guarantee of life to "any person," in the Fifth and Fourteenth Amendments, does include the unborn. Both State and federal governments have a duty to protect unborn life.

Alan Ernest
Counsel

(14)

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[42] Ernest, *supra* note 1, at 10.

Supreme Court, U.S.
FILED
NOV 12 1999
CLERK

No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, ET AL.,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

Amicus Brief of Life Legal Defense Foundation In Support of Petitioners

ANDREW W. ZEPEDA
(Counsel of Record)
CATHERINE W. SHORT
LIFE LEGAL DEFENSE FOUNDATION
P.O. Box 2105
Napa, California 94558
(707) 224-6675

Attorneys for Amicus

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Interests of Amicus[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrest of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990s, most of these pro-life advocates were seeking out other channels to express their opposition to abortion. Unfortunately, the response of municipalities in California was not to applaud this conversion to lawful means of protest, but to seek out ways to make the protests unlawful. For example, many California cities passed residential picketing ordinances, including ordinances which prohibited picketing within 300 feet of a "targeted" residence. *See Thompson v. City of San Jose*, 32 Cal.App.4th 330 (1995) cert. denied, 516 U.S. 932. Some cities passed "back-off" buffer zone laws, such as those struck down by the Ninth Circuit in *Sabelko v. Phoenix*, 120 F.3d 161 (9th Cir. 1997). At least one city enacted an ordinance creating eight-foot "demonstration-free" zones around the driveway entrances to health care facilities. *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (1998), cert. denied, 119 S.Ct. 1142 (1999). Another city attempted to limit the size of picket signs and

---

[1] Counsel of Record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

force picketers to keep moving. *Foti v. Menlo Park*, 146 F.3d 629 (9th Cir. 1998).

LLDF and those associated with it are very concerned about the proliferation of laws designed specifically to restrict anti-abortion speech.[2] Whether or not these ordinances survive facial challenges to their content-neutrality, they risk undermining the integrity of police and prosecutors charged with enforcing laws such as these, laws which are generally known and understood to be directed at particular speakers and viewpoints. LLDF submits that this Court should give careful scrutiny to restrictions on speech which are aimed directly at expressive activities surrounding particular social and political controversies.

I. Introduction and Summary of Argument

In 1993, the Colorado General Assembly enacted § 18-9-122, indisputably in response to reports of "harassment" and obstruction of individuals seeking access to medical facilities where abortions are provided. *See* Joint Appendix, 58a-216a. Unfortunately, the Assembly apparently was so focused on this particular context, and possibly even on particular locations, that it failed to consider the application of the statute to other contexts, as well as whether the language it used would be clear to those who wished to engage in peaceful expressive activity.

Although the Legislature was only thinking "inside the

[2] E.g., "There is no doubt that the City passed these ordinances in response to Foti and Larsen's [anti-abortion picketing] activities or that the City specifically sought to restrict their protests." *Foti v. Menlo Park*, *supra*, 146 F.3d at 633 n. 1.

box" of certain forms of anti-abortion protest, § 18-9-122 applies to a wide range of speech activity on public streets and sidewalks in the vicinity of *any* "health care facility" in the state. Thus, it was left to reviewing courts to place limiting constructions on the statute's broad terms in an effort to bring the application of the statute back within the confines of "the box" of anti-abortion protests. For example, the Colorado Court of Appeal stated, "As pertinent here, 'protest' refers to written or oral communication advocating a particular viewpoint *on medical treatment and procedures*." Pet. at 44a (emphasis added). Obviously, there is nothing on the face of the statute that indicates that the term "protest" applies only to certain topics. The Court of Appeals also explained, " 'Counseling and education' refer to efforts to present information or guidance to persons *entering or leaving a health care facility*." *Id.* (emphasis added). Again, nothing in the plain language of the statute indicates that, in the case of oral counseling and education, the "no-approach" strictures apply only when the approached person is entering or leaving a facility.

This Court observed a century and a quarter ago, "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876). Yet this is exactly the role that the lower courts here have agreed to play, namely, putting pinches and tucks in the legislature's net, allowing some to be detained while others go free, without any discernible relationship to a legitimate governmental interest.

A statute or ordinance which forbids an act "in terms so vague that men of common intelligence must necessarily guess

at its meaning and differ as to its application violates the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Moreover, laws which regulate or restrict speech must satisfy "a more stringent vagueness test." *Village of Hoffman Estates v. Flipside, Hoffman Estates* 455 U.S. 489, 499 (1982) (footnote omitted).

> Although the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine, the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (internal quotations and citations omitted.)

It is undisputed that C.R.S. 18-9-122 restricts constitutionally protected speech activity in the "quintessential" public forum of public streets and sidewalks. Because of the vagueness of its terms, the ordinance is arguably "violated scores of times daily, . . . yet only some individuals, those chosen by the police in their unguided discretion, are arrested." *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987).

Petitioners challenged the statute on a number of grounds

including the void-for-vagueness doctrine. Pet. 4a, 44a. The Colorado Supreme Court breezily pronounced that the statute's terminology was "simple and straightforward." Pet. at 24a. In the petition for certiorari, petitioners have relied principally on other constitutional challenges and have not highlighted their earlier void-for-vagueness challenge, although the issue has been preserved in the first question presented in the petition. Rather, Petitioners contend the statute is content-based or impermissibly delegates content-based censorship powers to the audience. Should those facial challenges prove unavailing, amicus submits that this Court should carefully consider the void-for-vagueness challenge which Petitioners preserved throughout the Colorado appellate process and that this Court should hold the statute to be void for vagueness.

II. Section 18-9-122 is Unconstitutionally Vague

"In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Village of Hoffman Estates v. Flipside*, *supra*, 455 U.S. at 494 (1982). "For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.'" *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973), quoting *Minnesota ex. rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940).

Section 18-9-122, in pertinent part, makes it a misdemeanor to "knowingly approach another person within eight feet of such person, unless such person consents, for the purpose of passing a handbill or leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with

such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility."

Section 18-9-122 is vague in at least four respects.

A. *"approach"*

The Supreme Court of Colorado stated that § 18-9-122(3) sets out the prohibited conduct "in rather simple but straightforward language." Pet. at 24a. However, other than simply repeating the term "knowingly approach," the court did not attempt to further describe the prohibited conduct. What the court did describe was conduct that would *not* violate the statute. The court stated that, "If one of the petitioners is *standing still* within the fixed buffer zone," then that person could not violate the ordinance. *Id.* (emphasis added). In the next sentence, the court states, "In other words, so long as the petitioner *remains still*, he or she cannot commit the actus reus of approaching, . . ." *Id* (emphasis added). These formulations indicate that any bodily movement by a speaker, e.g., holding out a leaflet at arm's length, gesturing to a person to come closer, repositioning or holding out a sign for better visibility, could constitute "approaching."

Webster's Third New International Dictionary defines "approach" as "to draw near to." Does § 18-2-122(3) prohibit only that motion which brings the speaker's entire body closer to the approached individual? Or does it also prohibit any bodily movement by the speaker directed at an individual who is within eight feet?

The Supreme Court of Colorado did not concern itself with the dynamic situation likely to be encountered on a busy sidewalk. Suppose, for example, that a protester is twenty feet from another person and, in compliance with the statute,

walked ten feet toward that person. Suppose further that, as the protester moved ten feet, the other person advanced five feet toward the protester. Has the protester committed a prohibited "approach"? One can formulate an argument that the protester has not violated the statute but, without any certain rule akin to basketball's offensive foul for charging, the argument provides little comfort. In the hurly-burly of a crowded sidewalk, any movement by a protester could be interpreted as a prohibited "approach."

Rather than being a "simple and straightforward" prohibition, the vagueness of the statute gives rise to many questions and no certain answers. Even if refined rules were adopted, fair application of the rules in a dynamic real life scenario would require a combination of referees, umpires and instant replay. The Assembly, having failed to set forth the rules of the game, has left it to policemen and prosecutors to formulate their own rules of engagement. This is intolerable especially where the regulated activity is speech in a public forum on matters of controversy.

B. *"unless such person consents"*

The Colorado Court of Appeals defined the term "consent" as "oral communication or unmistakable physical conduct manifesting agreement." Pet. at 44a. What does "manifesting agreement" mean? Is the speaker limited to approaching within eight feet of another if and only if the intended audience has unmistakably signaled that he agrees with the speaker's position? In other words, is the speaker limited to preaching to the choir, i.e., a person who already agrees with his viewpoint on the taboo subject of medical treatment and procedures? Or does "agreement" mean only "agreement" that one can come within eight feet of

the other to leaflet, display a sign, or counsel and educate?

Even presuming that "agreement" means agreement to be approached, it is difficult to apply that definition in the noisy, fluid environment of a city street or sidewalk. In contrast to the image of raucous crowds of demonstrators jostling abortion-bound women invoked by the General Assembly in enacting § 18-9-122, the courts reviewing the ordinance seemed to assume a sidewalk occupied by only two people, the patient and the speaker. In such a setting, the presumption runs, the speaker could ask permission to approach and the other person could consent or refuse, all with minuet-like precision and clarity.

In reality, it is highly likely that there will be other people on the sidewalk, including some who will interfere with the communication of request and consent. As the legislative history of § 18-9-122 indicates, abortion providers frequently employ "escorts" to patrol the public sidewalk and insert themselves between demonstrators and patients. Obviously, it would be very difficult for a speaker effectively to ask consent to approach and a patient effectively to communicate a response, with one or more escorts standing between, walking the patient down the sidewalk.[3]

Patient companions, e.g., boyfriends, husbands, parents also often take it upon themselves to inhibit or prevent communication between speakers and potential patients, includ-

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[3] It should be noted that nothing in § 18-9-122 prohibits an escort from approaching an individual and saying, "I think these people are idiots or dangerous or both. I'll walk with you into the clinic." The escort can continue making such enlightening comments (which are neither protest of a medical procedure nor education nor counseling) all the while the would-be speaker is attempting to request permission to approach.

ing the communication necessary to solicit and obtain consent.

For the speaker who simply wants to hand out leaflets to passers-by, the requirement of obtaining consent is extremely onerous. In *U.S. v. Kokinda*, 497 U.S. 720, 734 (1990) (O'Connor, J.) and *ISKCON v. Lee*, 505 U.S. 672, 690 (1992) (O'Connor. J.), a majority of this Court noted the distinction between leafleting and solicitation in terms of the impact on the flow of pedestrian traffic: "[C]onfrontation by a person asking for money disrupts passage and is more intrusive than an encounter with a person giving out information. One need not ponder the contents of a leaflet in order mechanically to take it out of someone's hand. . . . 'The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey' [citing *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 665 (1981) (Blackmun, J. conc. and diss.)]."

Under § 18-9-122, the ostensible purpose of which is to prevent interference with pedestrian and vehicular traffic, this "common sense" distinction is reversed. A person soliciting money may approach another without seeking consent. However, the speaker who wishes to offer a leaflet must first ask consent, and the intended recipient cannot "mechanically take it" but must affirmatively give consent. The process of the recipient pondering whether to give consent, pausing to communicate that consent, and waiting for the approach is more likely to disrupt sidewalk passage than is simple leafleting unencumbered by such requirements.

C. *"oral protest, education, or counseling"*

On its face, the challenged portion of the Colorado statute prohibits approaching within eight feet of another person for any of three purposes:

(a) passing a leaflet or handbill;
(b) displaying a sign; or
(c) engaging in oral protest, education or counseling. The three purposes are listed in the disjunctive and therefore presumably provide three independent bases for prosecution.

The Colorado courts have placed a limiting construction on only the third proscribed purpose. According to the Colorado Court of Appeal, "protest" does not encompass the entire universe of possible protests. Rather it is limited by the subject matter of the "protest", namely, to "written or oral communication advocating a viewpoint on medical treatment and procedures." Pet. at 44a.[4] But the limiting definition of "protest" does not seem to apply to the other prohibited purposes, i.e., wielding a sign or passing out leaflets. Thus the prohibition on "approaches" for the purpose of leafleting or displaying a sign is absolute. On the other hand, "approaching" to engage in "oral protest" appears to violate the statute only if the protest addresses a taboo subject,

[4] The Colorado Supreme Court initially seems to reject the Court of Appeal's narrowing construction of "protest" when it held that "[t]he restrictions apply squarely to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Pet. at 21a, 22a. But the state supreme court ultimately affirmed the Court of Appeal's decision, including presumably its narrowing construction, when it concluded: "section 18-9-122(3) represents a fair legislative balancing of the 'right to protest or counsel against certain medical procedures' while protecting 'a person's right to obtain medical counseling and treatment.'" *Id.* at 28a.

in this case, "a viewpoint on medical treatment or procedures."

The limiting construction the Colorado Court of Appeals places on "education or counseling" also complicates matters. The Court of Appeals not surprisingly defines education and counseling as "efforts to present information or guidance." Pet. at 44a. This definition is apparently not limited to the taboo subject of "medical treatment and procedures" but applies to the entire universe of possible subject matters. But the Court of Appeals goes on to limit the meaning of "counseling and education" by reference to a limited audience, namely, those "persons entering or leaving a health care facility." *Id.* Presumably, this leaves a citizen within 100 feet of a health care facility free to approach another without consent for the purpose of "counseling and education" provided that the other person is a mere passerby, i.e., is not entering or leaving the health care facility.

Perhaps because it seems the least confrontational form of speech and is presumed to be deserving of the most protection, one of the most popular activities outside of abortion facilities is public prayer. But whether prayer is prohibited by the Colorado statute is unclear. Might law enforcement consider prayer a form of "oral protest"? Can prayer conceivably be viewed as "counseling or education?" The terms are too vague to allow one to hazard an answer.

"A viewpoint on a medical treatment or procedure" is also subject to arbitrary interpretation by law enforcement and prosecutors. Is a person who advocates adoption in front of an abortion facility, expressing "a viewpoint on a medical treatment or procedure"? Is a person in front of a "health care facility" who offers economic assistance to poor pregnant women so that they may have the opportunity to give birth and raise a child, engaged in "protest"? Is a feminist

who has no objection to abortion procedures as such, but who protests against "sex-selection" abortions within 100 feet of a "health care facility", expressing a "viewpoint on a medical treatment or procedure"?

Indeed, the very notion of "protest" is relative. Protest is by definition an expression of dissent from, and objection to, the established order of things. In a democracy, protest is by the nature of things, a minority viewpoint. Hence to punish protest is to punish the minority viewpoint. It was to prevent just such oppression by majorities that the First Amendment was adopted.

The limiting construction placed on "protest" does not diminish the vagueness of the term; it simply focuses law enforcement on a smaller target, namely, those who would have the temerity to protest against "medical treatment or procedures" outside of "health care facilities." In light of the legislative history, these terms appear to be euphemisms for one particularly controversial medical procedure, namely, abortion. The legislative history strongly suggests that the legislature purposefully chose broad and expansive—indeed, very vague—language to ensure the appearance of facial content neutrality while affording "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Here the full discretion afforded to police to determine whether the suspect has engaged in oral protest, education or counseling "necessarily entrust[s] law making to the moment-to-moment judgment of the policeman on his beat." *Kolender*, *supra*, 461 U.S. at 1859-60 (internal quotation marks and citations omitted).

D. *"within a radius of one hundred feet from any entrance door to a health care facility"*

First, this provision contains no requirement that the approaching person knows that he or she is within one hundred feet of the entrance door to a health care facility.[5] Thus, before leafleting for any purpose on any public sidewalk, an individual must ascertain the nature of all of the surrounding businesses, vertically as well as horizontally, to determine whether the area is subject to the restrictions of § 18-9-122. The presence of a single chiropractic office or optometric outlet creates a no-approach zone applicable to all potential speakers.

Second, "health care facility" is defined as "any entity that is *licensed, certified, or otherwise authorized or permitted by law to administer medical treatment* in this state." Pet. at 65a. Thus, the wouldbe speaker is charged with knowing both what types of entities are licensed, certified, authorized or otherwise permitted to "administer medical treatment," as well as the actual status of any entity which could potentially create a no-approach zone. For example, is a dental office or a drug store a "health care facility"? A citizen who leaflets without first studying the

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[5] Cf., e.g., 18 U.S.C.A. § 922(q)(2)(A): "It shall be unlawful for any individual to knowingly possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual *knows, or has reasonable cause to believe*, is a school zone." 18 U.S.C.A. § 921(a)(25): "The term 'school zone' means . . . b) within a distance of 1000 feet from the grounds of a public, parochial or private school."

See also Cal. Pen. C. § 626.9(b) (West 1999): "Any person who possesses a firearm in a place that the person *knows, or reasonably should know*, is a school zone . . . shall be punished as specified in subdivision (f)."

state health code and/or business code does so at his own peril.

Third, "health care facility" is defined as "any *entity* that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state." By this definition, doctors, nurses, optometrists, dentists, etc. are themselves "health care facilities." Thus, an individual must ascertain what is the "entrance door" to one of these professionals.

At first glance, the easiest answer would be that the doors to a doctor's office are his entrance doors. However, in the case of multi-tenant office buildings, vagueness returns. Is the "entrance door" the door to the building or the door to a particular office within the building? How is the speaker to know the extent of the doctor's leasehold within the building, e.g., that, while the doctor's main office is on the fifth floor at the back, he also rents space for a lab on the first floor in the front?

Moreover, does a medical professional carry his "entrance doors" with him? Does the presence of a nurse on school premises create a no-approach zone within a hundred feet of any entrance door to the school? Does the presence of a company doctor create no-approach zones within one hundred feet of entrance doors to the company?

These examples illustrate not only the dangers arising from the lack of a scienter requirement as to the existence of a "no-approach" zone, but also the overbreadth of the statute. Section 18-9-122 creates literally thousands of zones in the state of Colorado where expressive activity is restricted.

Conclusion

In its discussion of this Court's decision in *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), the Colorado Supreme Court noted that "it was the uncertainty of how to comply with the injunction about which the Supreme Court appeared most concerned." Pet. at 27a. Indeed, if uncertainty was the main source of this Court's concern, then § 18-9-122 provides plenty of grounds for concern as well. Far from being a "simple and straightforward" time, place, and manner restriction, the prohibitions of § 18-9-122 are vague as to time, place, *and* manner.

This Court should find § 18-9-122 unconstitutional on its face. Concern for certainty "has, at times, led [this Court] to invalidate a criminal statute on its face even when it could conceivably have had some valid application." *Kolender*, *supra*, 461 U.S. at 359 n.8. This is just such a statute.

Respectfully submitted,

ANDREW W. ZEPEDA
(Counsel of Record)
CATHERINE W. SHORT
LIFE LEGAL DEFENSE FOUNDATION
P.O. Box 2105
Napa, California 94558
(707) 224-6675

Attorneys for Amicus

November 12, 1999

DEC 3 1999 (12) No. 98-1856

Supreme Court, U.S.
FILED
Dec 3 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, *et al.*,

Petitioners,

—v.—

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
COLORADO SUPREME COURT

BRIEF AMICI CURIAE THE STATE OF NEW YORK, ET AL., IN SUPPORT OF RESPONDENTS

ELIOT SPITZER
Attorney General of the
State of New York
Preeta D. Bansal
Solicitor General
Counsel of Record
Carol Fischer
Assistant Solicitor General
120 Broadway
New York, New York 10271
(212) 416-8020

Attorneys for The
State of New York

Of Counsel:

Jennifer K. Brown
Assistant Attorney General

(Counsel continued on inside cover)

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29pp

HON. JANET NAPOLITANO
Attorney General of Arizona

HON. BILL LOCKYER
Attorney General of California

HON. RICHARD BLUMENTHAL
Attorney General of Connecticut

HON. EARL I. ANZAI
Attorney General of Hawaii

HON. CARLA J. STOVALL
Attorney General of Kansas

HON. ANDREW KETTERER
Attorney General of Maine

HON. J. JOSEPH CURRAN, JR.
Attorney General of Maryland

HON. THOMAS F. REILLY
Attorney General of Massachusetts

HON. JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

HON. JOSEPH P. MAZUREK
Attorney General of Montana

HON. FRANKIE SUE DEL PAPA
Attorney General of Nevada

HON. PATRICIA A. MADRID
Attorney General of New Mexico

HON. W. A. DREW EDMONDSON
Attorney General of Oklahoma

HON. HARDY MYERS
Attorney General of Oregon

HON. SHELDON WHITEHOUSE
Attorney General of Rhode Island

HON. WILLIAM H. SORRELL
Attorney General of Vermont

HON. CHRISTINE O. GREGOIRE
Attorney General of Washington

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STATEMENT OF INTEREST

The amici curiae States respectfully submit this brief in support of Respondents.

The interest of the amici States lies in preserving the power of state legislators to deal with serious public safety issues by appropriate means. Zones of separation and buffer zones, such as the ones employed in Colorado, have been important legislative tools for ensuring access to public places and preventing violence, intimidation and other threats to the public peace and safety in a variety of contexts.

To the extent that Petitioners argue that laws authorizing such zones are never lawful even though their effect on expressive speech is limited, or that they should be subject to strict scrutiny even if they are content-neutral, Petitioners are attempting to place unreasonable limitations on the States' police powers.

SUMMARY OF ARGUMENT

Colorado's experience with obstruction, intimidation and threats of violence at the sites of medical facilities, as documented in the hearings conducted by the State legislature, is not unique. A number of States have enacted laws meant specifically to ensure access to medical care, or to prohibit attacks on medical care facilities, and have done so using a broad array of means, ranging from expanding trespass laws to prohibiting particular forms of harassment (such as making harassing telephone calls to health care facilities).

None of these laws has been passed to discourage lawful speech. They are designed, instead, to address problems that arise from the States' fundamental obligation to protect the health and well-being of their citizens: the protection of access to health care services, prevention of threats to individual and public safety, and preservation of the peace. Such laws are, therefore, the product of the legitimate exercise of each State's police power. As this Court has long recognized, the significance of a State's health and safety concerns justifies the enactment of laws that may impose some limitations on speech, so long as such limitations are reasonable as to time, place and manner. Petitioners in this case have not justified a departure from this long-established standard.

In this case, the zone of separation created by Colorado's statute is amply justified under the Court's prior First Amendment jurisprudence and by the practical realities of law enforcement, and should be upheld. Buffer zones and zones of separation have long proven to be reasonable methods for preserving public health and safety, even when the conduct affected includes lawful speech. Their use has been affirmed by this Court to ensure access to polling places (Burson v. Freeman, 504 U.S. 191 (1992)), to prevent attempts to influence court proceedings (Cox v. Louisiana, 379 U.S. 559 (1965)), and to prevent disruptions of foreign embassies (Boos v. Barry, 485 U.S. 312 (1988)), among other situations. Because the problems raised by health care facility conflicts are as serious as the concerns at issue in those cases, States should retain the ability to use buffer zones and zones of separation as a means of ensuring access to health care.

States' use of zones of separation and buffer zones is also supported by the recommendations prescribed by the Police Executive Research Forum (PERF), which recently studied law enforcement responses to conflicts at health care clinics. In that study, the result of extensive work with police departments across the country, PERF concluded that the best way to prevent clinic confrontations from escalating to violence while preserving the rights of all parties involved was to establish straightforward, objective rules of conduct that could be communicated in advance to the entire community and to law enforcement personnel. Having such guidelines would help prevent the erratic enforcement of the law and related problems, such as the speech-chilling use of excessive force by police against protesters.

A law such as Colorado's statute offers such a prospective rule: it is communicated in advance to all persons involved in protests and is designed to be applied consistently by law enforcement personnel to all health care facilities within the State. Such a statute, therefore, offers an important way to prevent health clinic conflicts from becoming a drain on local law enforcement and judicial resources, and removes much of the danger of selective or erratic enforcement that can be the result of reliance on trespass and harassment laws.

ARGUMENT

I. STATES MUST RETAIN THEIR FLEXIBILITY TO ENACT APPROPRIATE LEGISLATION THAT RESPONDS TO PUBLIC HEALTH AND SAFETY CONCERNS

A. Preserving Access to Health Care Facilities Is An Appropriate Subject Of The Traditional Police Power of The States

Promoting access to health care by protecting patients, health care employees and the general public while protecting the rights of others to register vigorous public opposition to certain health care services is a problem that has taxed the ingenuity of legislatures around the country, as well as Congress. As Justice Kennedy recognized a few terms ago, where "considerable disagreement exists about how best to accomplish [a] goal. . . . the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

A survey of the relevant laws (a summary of which is attached as an appendix) confirms that States have, indeed, been laboratories for experimentation on how to balance public safety, health care access, and the free speech rights of protesters. They may be divided, with a slight degree of

overlap, into two categories: those designed to ensure public peace by preventing interference with the operations of medical facilities, and those designed to ensure access to medical facilities. (Colorado's statute, Col. Rev. Stat. § 18-9-122(3) (1999), belongs to this second category). The laws neither target particular medical facilities nor particular viewpoints. Instead, they apply to conduct occurring at a range of medical facilities, including single-service facilities such as abortion clinics or in vitro fertilization clinics.

The approaches chosen reflect each State's particular experiences with serious public safety problems. Minnesota, for example, responded to its experience of dozens of incidents of arson, attempted arson or attempted bombing, assault, bomb threats, vandalism and trespass outside a variety of medical facilities. See Chronology of Violence and Harassment at Medical Facilities, Major Unlawful Incidents Occurring in the Twin Cities 1977-1993 (undated, on file with New York State Attorney General's Office). The Massachusetts clinic access statute was preceded by toxic chemical and bomb assaults on clinics, see "Unblocking the Clinic Doors," The Boston Globe, June 1, 1993, p. 10, while New York's law was enacted after abortion clinic bombings and shootings in Massachusetts, Florida and Alabama and the murder of a Buffalo, New York doctor. (New York State Assembly, 1999-2000 Sess., Memo on Bill A09036 (1999)).

In California, protesters had used butyric acid on the walls of abortion clinics and tied up physicians' telephone and facsimile lines, see Historical and Statutory Notes Cal. Civ. Ann. § 3447 (West 1999)). Oregon had been urged by the State

Medical Association to expand its statutory protection of health clinics after, among other events, a break-in by animal rights activists at the University of Oregon and an arson attack on a health care facility that performed abortions. See Hearing on H.B. 2518 Before the Subcommittee on Crime and Corrections of the House Judiciary Comm., 67th Legis., 1993 Reg. Sess. (Or., Apr. 22, 1993) (statement of Dr. James Cross, President, Oregon Medical Association) . In Colorado, abortion clinics had been vandalized (JA-63, 67), clinic staff, patients and protesters had been physically assaulted (JA-57, 59, 67, 93-94) and neighbors had regularly been bombarded with nuisance-level noise. (JA-107).

Ensuring access to health care facilities and preventing medical clinics from being the sites of harassment, obstruction and violence raises serious, inter-related concerns: preventing violence against persons; preventing trespass on, or destruction of, private property; ensuring access to health care; and preserving the public peace. Each of these concerns lies squarely within the realm of the police powers of the State. "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (citation omitted). See also Nollan v. California Coastal Com., 483 U.S. 825, 837 (1987) (protection of public safety is "a core exercise of the State's police power"); Kelley v. Johnson, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power"); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-83 (1946) ("[p]rotection of the safety of persons" is "one of the traditional

uses of the police power of the States," and "one of the least limitable of governmental powers").

B. In Appropriate Circumstances, Exercises of the State Police Powers Justify Some Restrictions on First Amendment Rights

The importance of a State's ability to protect the health and safety of its citizens has meant that some burden on First Amendment rights will be upheld. "'[T]o say the [statute] presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation.'" Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803-04 (1984) (emphasis in original, quoting Metromedia, Inc. v. San Diego, 453 U.S. 490, 561 (1981) (Burger, C.J., dissenting)). "It has been clear since this Court's earliest decision concerning the freedom of speech that the State may sometimes curtail speech when necessary to advance a significant and legitimate State interest." Taxpayers for Vincent, 466 U.S. at 804.

Taxpayers for Vincent concerned Los Angeles's ban on all sign postings on public property. While recognizing that the challenged ordinance "prohibits [persons] from communicating with the public in a certain manner, and presumably diminishes the total quantity of their communication," id. at 803, the Court nonetheless held that the complete ban on that particular means of communication was constitutional. Its previous cases, the Court explained, had "rejected the notion that a city is powerless

to protect its citizens from unwanted exposure to certain methods of expression that may legitimately be deemed a public nuisance," and acknowledged that governments have a weighty interest "in proscribing intrusive and unpleasant formats for expression." Id. at 805-06. The Court did not suggest that the city was limited to banning signs on a case-by-case basis, which, of course, could have raised discrimination claims. To the contrary, "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property constitutes a significant substantive evil within the City's power to prohibit," id. at 807, and that evil could be addressed by a total ban.

The "substantive evil" addressed by Colorado's statute, and by other laws that prohibit the obstruction of clinic access, includes actual verbal assault and physical intimidation. Colorado's statute is certainly more limited than the ordinance at issue in Taxpayers for Vincent, since the statute curtails communication only in a limited area, and only under certain circumstances. Cf. Lovell v. Griffin, 303 U.S. 444, 451 (1938) (suggesting, in dicta, that a restriction on distributing literature that was "limited to ways that might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, [or] the molestation of the inhabitants" could be consistent with the First Amendment).

II. BUFFER ZONES AND ZONES OF SEPARATION ARE CONSTITUTIONALLY APPROPRIATE TIME, PLACE AND MANNER REGULATIONS

A. The Correct Standard For Evaluating A Content-Neutral Statute That Affects Speech Is To Assess Whether It Is Reasonable As To Time, Place and Manner

Petitioners claim that the Colorado Supreme Court "fundamentally erred when it held, simplistically, that identical restrictions in a statute face less demanding scrutiny than injunctions," and that statutes are somehow more discriminatory than injunctions (Pet. Br. 26 fn. 18). That contention is a misreading of this Court's decisions distinguishing statutes from injunctions, and ignores the reasons for that difference, which are based on fundamental distinctions between the roles of the legislature and the judiciary.

The legislature is composed of elected officials; its laws "represent a legislative choice regarding the promotion of particular societal interests." Madsen v. Women's Health Center, 512 U.S. 753, 764 (1994). It has the power to enact laws of general application because its proceedings are subject to public debate, and its officials to regular elections.

The function of a court is, quintessentially, to determine only the rights of those parties who are actually before it. Its fact-finding abilities are limited to the case at hand, and its

decisions are normally subject only to appellate review. Because courts may proceed only on a case-by-case basis, injunctions create a greater risk of discrimination and uneven enforcement of the law than do general ordinances:

> Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."

Madsen, 512 U.S. at 764 (citations omitted).

The appropriate standard, therefore, for evaluating a statute or regulation that imposes some restrictions on protected speech but is content-neutral is the one reaffirmed by this Court in Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding city regulation requiring sponsors of park bandshell concerts to use sound-amplification equipment and sound technician approved by the city). So long as the law furthers a significant State interest and leaves open ample alternative channels for communication, it need not employ only the "least restrictive alternative." Ward, 491 at 491. To the contrary:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected

> speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Ward, 491 U.S. at 798-99 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

Restrictions as to the time, place and manner of protected speech are therefore not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." Albertini, 472 U.S. at 689. In Ward, the fact that the city already had established noise regulation guidelines (and presumably enacted general nuisance laws as well) did not justify the invalidation of the regulation, since those guidelines had proven to be ineffective in controlling the problem. Ward, 491 U.S. at 785.

B. Zones Of Separation Are Constitutionally Valid Means Of Protecting State Interests Without Unreasonably Burdening Speech

Petitioners and their amici ignore the States' interest in protecting health, safety and property. See Pet. Br. 25

(asserting that Colorado has no "legitimate" interest at stake). Indeed, they appear to argue that States are never entitled to enact laws that contain zones of separation, such as the one contained in the statute at issue. (Pet. Br. 26-27). It is their position that when dealing with problems of health clinic access, the States' police power ought to be limited to general assault and nuisance laws. (Pet. Br. 20-21). Were this true, numerous decisions by this Court that have upheld the use of buffer zones, and other restrictions on expression, would have to be overturned.

Zones of separation such as those required by Colorado's statute have long proven that they can ensure access to vital services, prevent intimidation and violence, and maintain the public peace while imposing only limited and reasonable restrictions on speech. In Burson v. Freeman, 504 U.S. 191 (1992), this Court upheld a Tennessee statute that prohibited solicitation of votes and distribution of campaign literature within 100 feet of the entrance to a polling place. Even though the speech at issue was political and the ban on solicitation and distribution of leaflets within those zones was absolute, this Court concluded that the necessity of using buffer zones outside of polling places was supported by the long history of intimidation, corruption and violence in connection with voting. See Burson, 504 U.S. at 200-205 (Blackmun, J., plurality op.) (citation omitted) and Burson, 504 U.S. at 214-15 (Scalia, J., concurring).

The Court specifically concluded that alternatives to the buffer zones, such as criminalizing interference with an election or the use of violence or intimidation to deter voting, would not

be sufficient to deter most of the "confusion and undue influence" to which voters might be subject, because those laws would address only "the most blatant and specific attempts" to impede elections. Burson, 504 U.S. at 199, 206-07 (plurality op., citation omitted). The buffer zone, therefore, was approved as a reasonable means for assuring access to polling places.

Laws that have limited protesters' access to certain areas, or to certain distances from the subject of their protests, have been upheld in many situations in which they have been used to prohibit the disruption of a facility or to preserve the peace. In Boos v. Barry, 485 U.S. 312, 330 (1988), the Court held that a District of Columbia statute prohibiting any congregation within 500 feet of an embassy after the police had requested the crowd to disburse, provided that the congregation was directed at the embassy and the police reasonably believed that the embassy's "security or peace" was threatened, was a reasonable, content-neutral time, place and manner regulation. See also Cox v. Louisiana, 379 U.S. 559 (1965) (statute that prohibited picketing near a courthouse with the aim of influencing legal proceedings upheld, although conviction at issue voided because of entrapment); Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding ordinance that outlawed demonstrations near schools when in session, due to State's legitimate interest in preventing disruptions in education); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (upholding rule prohibiting members of religious organization from distributing literature within public fairground, since their activities would create disruptive traffic control problems).

Colorado's statute is less restrictive than any of the preceding statutes. It does not limit anyone's ability to congregate at any distance from a clinic entrance, nor does it prohibit speech or leafleting at all, except under one specific circumstance: within a 100-foot radius of a clinic entrance, a person may not deliberately approach another person within a distance of eight feet if that person does not wish to be approached. The statute, therefore, prohibits only that conduct that the legislature reasonably concluded was most likely to interfere with access to health services, and lead to obstruction and physical conflict. Protesters may engage in any lawful activity outside of the 100-foot area, and may employ any lawful means of communication except the one proscribed within the 100-foot area — regardless of how close they are to a clinic worker, patient, escort or passer-by. By the standards set forth in Ward, Burson and the other buffer zone cases, the statute is a legitimate exercise of the State's police power and a reasonable time, place and manner restriction on speech.

III. ACTUAL LAW ENFORCEMENT EXPERIENCE CONFIRMS THAT ESTABLISHING STATE-WIDE GUIDELINES FOR EXPRESSIVE ACTIVITY NEAR HEALTH CARE FACILITIES OFFERS SIGNIFICANT BENEFITS TO ALL PARTIES

The decisions of this Court that have upheld statutes that have established buffer zones between demonstrators and the objects of their demonstrations are consistent with actual police experiences, which show that having clear, predictable

guidelines understood in advance by all parties (including the police officers themselves) reduces violent confrontations at health care facilities while preserving the First Amendment rights of protesters.

In 1996, the Police Executive Research Forum (PERF) conducted a study of abortion clinic conflict, in order to determine which police department policies and practices were most effective in reducing violence at health care facilities. Its final report, A Conflict of Rights: Public Safety and Abortion Clinic Conflict and Violence, published in January 1999, was based on an in-depth study of nine police departments from all areas of the country that had regularly dealt with abortion-related conflict and violence. In addition to conducting extensive interviews with police officers, PERF also met with local pro-choice and anti-abortion activists, and other people in the community with an interest in clinic protests, such as clinic workers, journalists, and criminal justice officials. See A Conflict of Rights, at 6.

PERF found that the departments who were most successful in minimizing conflict while preserving the rights of both pro-choice and anti-abortion activists to engage in protests at or near abortion clinics were those that had both clear goals and neutral response protocols they could apply on a consistent basis. Id. Police departments, which are obligated to protect the rights of protesters, clinic workers, patients, and uninvolved third parties, were invariably viewed as biased by activists on both sides. Such perceptions of bias often exacerbated community conflicts. The factor most often cited by both sides was inconsistency of law enforcement:

> Across all sites, participants viewed the police as biased toward the opposition. They argued police responses, attitudes, language and behavior are influenced by officers' biases. All participants reported experiencing problems with patrol officers. Patrol responses were often inconsistent, over-aggressive (pain compliance), under-aggressive (allowing protestors to block clinics), slow, uninformed about relevant laws and injunctions, and insensitive to the needs and rights of either the clinics or the Pro-Life protestors.

Id. at 8.

This perception of bias was often based on fact. Erratic and unpredictable police responses to clinic confrontations were often the result of officers' highly subjective responses to the issue of abortion and abortion protests: some treated all disturbances as trivial nuisances, others interpreted even passive resistance by protesters as a deliberate challenge to police authority and reacted with excessive force. Id. at 12-13. The inconsistencies of police responses led all affected parties to see the police as unprofessional and ineffective. Id. at 12.

PERF ultimately concluded that the best way departments could prevent clinic confrontations from escalating to violence while preserving the rights of all parties involved was to establish clear rules of behavior that could be

communicated in advance to the entire community:

> Police departments should establish clear guidelines regarding their responses to both routine calls for service on abortion issues and at planned events such as demonstrations and protests. These guidelines should outline clearly acceptable behavior for participants and explain the police response in instances when violations occur.

Id. at 9.

A statute such as Colorado's, which prospectively establishes an objective yardstick for lawful conduct, is consistent with the requirements of PERF's recommendation. It accomplishes several important goals that could not be met by an injunction tailored to one clinic or a few specific protesters, or by requiring police officers to make ad hoc, on-the-spot decisions as to what behavior constitutes unlawful harassment. These goals are:

- Consistency in enforcement. By offering a consistent standard of conduct to which protesters must adhere, it prevents the uneven application of harassment, access or trespass laws. Responses to clinic confrontations should no longer vary significantly from city to city, or clinic to clinic, within one State.

- Reinforcement of police neutrality. By

providing police officers with clear boundary lines to enforce, it allows the police to act in a neutral manner. This, in turn, helps to remove perceptions of police bias as an exacerbating factor in confrontations.

◆ Protection of rights of expression. A clear guideline for conduct protects the rights of protesters by preventing over-reactions by police officers who are unsure of what conduct is and is not lawful, minimizing the danger that lawful speech will be chilled.

◆ Conservation of limited law enforcement and judicial resources. Witnesses in Colorado have already testified that the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994), and the eight-foot zone of limited separation rule already in force in the cities of Boulder and Denver, have reduced confrontations; indeed, very few arrests had been made for violations of either ordinance. (JA-71, 106-07, 127-28). Establishing a State-wide standard that is understood by all parties will reduce the need to involve the police in demonstrations or to turn to courts for injunctive relief.

CONCLUSION

For all the of the reasons stated above, the decision of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
PREETA D. BANSAL
Solicitor General
Counsel of Record
CAROL FISCHER
Assistant Solicitor General
JENNIFER K. BROWN
Assistant Attorney General
120 Broadway, 25th Floor
New York, New York 10271-0332
(212) 416-8020

APPENDIX

Below are brief summaries of the State laws currently in force that are meant to either prevent interference with the operations of health care facilities or to ensure access to health care facilities:

California: Cal. Penal Code § 11413 (1998) (prohibits explosion of a destructive device or arson in order to terrorize health facilities or meeting sites of organizations that counsel for or against abortion); Cal. Penal Code § 602.11(a) (prohibits intentional obstruction of access to a health care facility); Cal. Civ. Code § 3427.1 (1995) (creates tort of "commercial blockade," the intentional blocking of access to health care facility or disruption of the facility's normal functioning).

District of Columbia: D.C. Code Ann. § 22-1114.2(a)(1996) (prohibits interference with or obstruction of access to a medical facility, the making of unreasonable noise outside the facility, and the making of repeated harassing phone calls to owners, agents, patients or employees of the facility or threatening to injure them).

Kansas: Kan. Stat. Ann. § 21-3721 (1998) (prohibits entry onto public or private land or structure in a way that interferes to with access to or from a health care facility).

Maine: 5 Maine Rev. Stat. § 4684-B(2) (prohibits physical obstruction of a building, disruption of a building's activities by tying up phone lines, the release of noxious odors, or the creation of noise that is audible within a health care facility with the intent to either jeopardize the health of those receiving health care services or to interfere with the "safe and effective" delivery of health care services).

Maryland: Md. Ann. Code art. 2, § 577B (1999) (prohibits intentionally preventing another from entering or leaving a medical facility).

Massachusetts: Mass. Ann. Laws ch. 266, § 120E (1999) (prohibits knowing obstruction of access to medical facility or entry into any medical facility in order to impede its operation).

Minnesota: Minn. Stat. § 609.7495 (1993) (prohibits "intentionally and physically" obstructing access to various designated facilities, including medical facilities).

Nevada: Nev. Rev. Stat. Ann. § 449.760(1) (1998) (prohibits intentionally preventing another from entering or leaving a medical facility).

New York: 1999 N.Y. Laws ch. 635, to be codified at N.Y. Penal Law §§ 240.70-240.71 (1999) (prohibits use of physical force, threat of physical force, or physical obstruction to intentionally injure, intimidate

or interfere with a person seeking to obtain or provide services at a health care facility).

North Carolina: N.C. Gen. Stat. § 14-277.4(a) (1993) (prohibits obstruction of access to medical facility, and threats to injure a person who has been obtaining, providing or aiding another to obtain health care services).

Oregon: Or. Rev. Stat. § 164.365 (1997) (prohibits bombing, arson, or interference with or obstruction of access to a medical facility, or using or manipulating the facility's property in order to interfere with its efficiency).

Washington: Wash. Rev. Code Ann. § 9A.50.020 (1999) (prohibits disruption of the functioning of a health care facility by obstructing access to the facility, making noise that disturbs the peace within the facility, trespassing on the facility, repeatedly telephoning the facility, or threatening to injure the owners, agents, patients, employees or property of the facility).

Wisconsin: Wis. Stat. § 943.145 (1998) (prohibits entry into a medical facility without consent in order to create or provoke breach of the peace).

DEC 3 1999

(13)

No. 98-1856

Supreme Court, U.S.
FILED
DEC 3 1999
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LEILA JEANNE HILL, *et al.*,
Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,
Respondents.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS AND THE AMERICAN MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ANN E. ALLEN
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

CARTER G. PHILLIPS
MARK E. HADDAD *
LEE L. AUERBACH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

MICHAEL L. ILE
LEONARD A. NELSON
AMERICAN MEDICAL ASSOCIATION
515 North State Street
Chicago, IL 60610
(312) 464-4600

Counsel for Amici Curiae

December 13, 1999

* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Amici will address the following question:

Whether a statute that makes it unlawful knowingly to approach closer than eight feet to an individual who is within 100 feet of the entrance to a health care facility, unless the individual consents to the approach, for the purpose of handbilling, displaying a sign, or engaging in oral protest, education, or counseling, is a reasonable restriction on the time, place, and manner of speech.

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INTEREST OF *AMICI CURIAE*

Amici are national, private, voluntary, nonprofit organizations of physicians dedicated to promoting the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amicus* American College of Obstetricians and Gynecologists (ACOG) is the leading group of professionals providing health care to women; its more than 40,000 members represent over 90 percent of all obstetricians and gynecologists practicing in the United States. *Amicus* American Medical Association (AMA) was founded in 1847 to promote the science and art of medicine and the betterment of public health. The AMA's nearly 300,000 members practice in all fields of medical specialization.

Amici have a two-fold interest in this case. First, the Colorado statute at issue regulates conduct that has had a demonstrably deleterious effect on the health and welfare of patients at medical facilities. The conduct prohibited by this statute increases the risks associated with the provision of medical services to patients. Second, *amici* believe that health care providers have a fundamental right to be free from focused, intimidating and harassing picketing and other forms of coercive protest that include violence and threats of violence and which impede their ability to provide lawful health care services. See *e.g.*, App. 1a (policy statement of AMA House of Delegates opposing all acts of violence and intimidation against healthcare providers and medical facilities (including abortion clinics and family planning centers), and supporting the individual's right of access to such facilities). Because this case concerns the extent to which a state can regulate conduct that is fundamentally incompatible with the health and safety of patients and health care providers, *amici* wish to present their views.[1]

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been

(continued...)

BACKGROUND

Easily overlooked in the often heated ethical, moral, and legal debate surrounding abortion is the fact that it is an invasive medical procedure. When performed correctly by trained and experienced physicians, abortion is relatively safe. Nevertheless, an estimated 5,000 women "suffer a serious complication" from the procedure each year, and "the potential for complications is a major public health concern." Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985). Among the most serious complications are infection necessitating hospitalization, hemorrhage requiring transfusion, uterine perforation, bowel or bladder injury, pulmonary embolism, endotoxic shock, convulsions, cardiac arrest and, in rare circumstances, death.[2]

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[1](...continued)
lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief. Rule 37.6.

[2] Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 267 n.† (1977); Cates et al., *Prevention of Uterine Perforation During Curettage Abortion*, 251 JAMA 2108 (1984). Some 240 deaths associated with legal, induced abortions were reported to the Centers for Disease Control and Prevention between 1972 and 1987. Lawson et al., *Abortion Mortality, United States, 1972 Through 1987*, 171 Am. J. Obstet. Gynec. 1365, 1367 (1994). The leading causes of abortion mortality are hemorrhage, anesthesia complications, infection and amniotic fluid embolus. *Id.*; Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 90 (1986).

In the United States, approximately 70 percent of all abortions are performed in stand-alone clinics,[3] such as the Planned Parenthood clinics and Boulder Women's Clinic where petitioners have protested. These clinics are licensed medical facilities, staffed by physicians and other trained medical personnel who, in addition to performing or assisting with the abortion procedure itself, administer general and local anesthesia before the operation and analgesics and other necessary medications after the operation. The medical staff also must recognize and respond to any of the major or minor complications that might arise during or after the procedure. In addition, almost all clinics provide other medical services, most typically contraceptive care to nonabortion patients, general gynecologic care, treatment for sexually transmitted diseases and general medical care.[4] Some of this care, such as performing pap smears to detect cervical cancer, is potentially life-saving. See J.A. 62.

In Colorado, as in other states, only a small percentage of patients who visit facilities where surgical abortions are performed are seeking abortion services. For example, in the 26 clinics it operates in Colorado, Planned Parenthood facilities see approximately 60,000 patients for family planning services each year. J.A. 62. Abortion patients comprise only about seven

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[3] Henshaw, *Abortion Incidence and Services in the United States, 1995-1996*, 30 Fam. Plan. Persp. 263 (1998).

[4] Henshaw, *supra* note 3, at 269. Many clinics also provide nongynecologic surgery, obstetric care, infertility counseling or treatment, HIV testing and female sterilization. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plan. Persp. 246, 247 (1991).

percent of that total. *Id.*[5] These Planned Parenthood clinics annually perform approximately 25,000 pregnancy tests and 55,000 pap smears. *Id.*

Notwithstanding the fact that most patients who visit these facilities seek services other than abortions, the facilities, many of their patients, and many of the persons who accompany them to office visits, are subjected to sometimes aggressive, sustained anti-abortion protests and demonstrations.[6] The "protestors are there all the time, shouting and screaming." J.A. 98. "They ignore the fact that many women who use these clinics are not there for abortions." *Id.* at 182. Indeed, a representative of Operation Rescue Colorado conceded that protestors have no means to discern whether a particular patient entering a clinic is seeking an abortion or other medical services. *Id.* at 75-76. Thus, women who visit clinics for non-abortion services often must run the same gauntlet of abuse and harassment as women seeking abortions. *Id.* at 65. "[The protesters] will shout at anybody coming in, male, female, it doesn't matter." *Id.* at 99. As a consequence, some women delay or forgo necessary medical examinations or treatment.[7]

Witnesses who testified during the legislative hearings that preceded the enactment of Colo. Rev. Stat. § 18-9-122 depicted numerous forms of confrontational, "in-your-face"

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[5] Similarly, abortions account for less than one percent of the practice of Denver obstetrician and gynecologist, Dr. Charles H. Gartner. J.A. 217-18.

[6] *See* J.A. 59, 69, 100, 182, 218, 220, 222, 234.

[7] *See* J.A. 66 ("people often won't come on the days that they know we are doing abortions . . . because they don't want to be subjected to that"); *id.* at 219 (several patients indicated they would not return for pre-natal care because they did not want to endure harassment).

conduct by antiabortion protestors designed to harass, upset, intimidate, and obstruct clinic patients and staff. This behavior included yelling and screaming, J.A. 65-67, 69, 98, 154; the thrusting of graphic signs and placards into patients' faces, *id.* at 66, 69, 70, 154, into car windows and onto windshields, *id.* at 67, 99, 105-06; physical assaults, including pushing, shoving, biting, pinching and kicking, *id.* at 93-94, 158; verbal assaults, *id.* at 71, 183; attempts physically to pull patients out from within the midst of escorts attempting to protect them, *id.* at 158; the blocking of parking lot and building entrances, *id.* at 63, 93; storming clinic buildings, *id.* at 94; and vandalism, such as gluing shut clinic door locks and pouring butyric acid onto clinic floors. *Id.* at 63-64, 67.[8] One objective of these tactics is to "try to upset the patient as much as possible." *Id.* at 66.

This testimony is consistent with nationwide trends. A leading researcher on women's healthcare issues has reported that in recent years harassment of women and providers at abortion clinics has become more widespread and has involved more individual protestors. Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp. 54, 59

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[8] The record is replete with other evidence of such conduct in the form of affidavits submitted to the district court. *See* J.A. 218 ("[D]emonstrators . . . would surround patients' cars after they parked, and aggressively approach patients, sometimes yelling at them and thrusting signs or literature in their faces"); *id.* at 222-23 ("demonstrators surrounded the car, slapped their signs against the windshield, and yelled at and taunted [escorts]"); *id.* at 223 (demonstrators "shoved signs in [a patient and her mother's] faces," would call patients, their family members and escorts "murderers," tell patients they are going to die, and taunt patients and their family members with inflammatory and abusive language, including racial epithets); *id.* at 224 ("Demonstrators jostled patients, screamed at them, and thrust signs and pamphlets in their faces").

(1995).[9] Fifty-five percent of nonhospital providers reported experiencing at least one form of harassment during 1992. *Id.* at 58. Of nonhospital facilities that performed 400 or more abortions in 1992, one-half reported picketing with physical contact or blocking of patients, 42 percent reported vandalism and 30 percent reported blockades. *Id.* at 58.

1. The Adverse Health And Safety Effects Of Protest Activities Outside Abortion Clinics.

The activities described above increase the medical risks associated with abortions and other procedures. By increasing patients' pre-surgical emotional stress, this conduct increases the difficulty and risk of administering medical treatment and places patients at greater risk of suffering serious complications.

For example, coping with the emotional complexities of an unwanted pregnancy is recognized to be a particularly

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[9] Such conduct also has been described in numerous court decisions around the country. *See, e.g., Operation Rescue-National* v. *Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 550-51 (Tex. 1998) ("protestors were confrontational, coming within inches of patients' faces and shouting at them"); *Planned Parenthood Shasta-Diablo, Inc.* v. *Williams*, 898 P.2d 402, 404 (Cal. 1995), *cert. denied*, 520 U.S. 1133 (1997) (sidewalk counselors pressed literature and plastic replicas of fetuses on patients attempting to enter the clinic); *Pro-Choice Network* v. *Project Rescue*, 799 F. Supp. 1417, 1424-26 (W.D.N.Y. 1992) (if a woman passed a sidewalk counselor without changing her mind, she would then pass through a throng of protestors who harassed and screamed at her, and sometimes even assaulted her), *aff'd in part and rev'd in part on other grounds*, 67 F.3d 359 (2d Cir. 1994); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1346 (3rd Cir. 1989) (demonstrators pushed, shoved, and tugged on patients as they attempted to enter clinic); *Fargo Women's Health Org.* v. *Lambs of Christ*, 488 N.W.2d 401, 405 (N.D. 1992) (screaming protestors struck, pushed, and threatened escorts).

stressful life event.[10] In addition, many women approach abortion, like any other invasive procedure, with trepidation because it "is a medical procedure which may be uncomfortable or painful." Landy, *supra* at 38.[11] Indeed, most adult patients have some degree of state anxiety (*i.e.*, relatively short-term anxiety of external origin) relating to anesthesia (Garfield, *Psychologic Problems in Anesthesia*, 10 Am. Fam. Physician 60, 61-62 (1974)), and even a minor surgical procedure can create "an important problem of emotional stress for many patients." Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688, 694 (1987).[12]

For patients already in a state of emotional vulnerability, protest activity at close range can "have a profound negative effect on the psychological and physiological health." J.A. 272-73. Warren M. Hern, M.D., M.P.H., Ph.D., a physician who maintains a private practice at the Boulder Abortion Clinic, observed that on the days protests took place at that facility patients experienced "considerably more stress," the level of which corresponded to the aggressiveness of the demonstrators.

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[10] Adler et al., *Psychologic Factors in Abortion*, Am. Psychologist, Oct. 1992, at 1194, 1197; Landy, *Abortion Counseling--A New Component of Medical Care*, 13 Clin. Obstet. Gynec. 33, 36 (1986); Frankel-Fein, *Defense Style, Social Support Appraisal, Responses to a Counseling Session, and Stress Perception in Women Undergoing Abortion* 4, 31 (1991); Polk-Walker, *Counseling Implications in a Client's Choice of Anethesia During a First or Repeat Abortion*, 28 Nursing F. 22 (1993).

[11] *See also* Handy, *Psychological and Social Aspects of Induced Abortion*, 21 Brit. J. Clin. Psychol. 29, 37 (1982).

[12] This is especially true of teenagers, who lack experience with pelvic examinations and medical procedures generally. Landy, *supra* at 38.

Id. at 220, 273. Patients would come into his office shaking, tearful and in great distress from harassment and insults, and from the fact that the demonstrators approached them very closely. *Id.* Clinic staff would have to calm them down for some time, which often delayed their medical care. *Id.* On one occasion, a young adolescent girl was so emotionally traumatized by an especially hostile and abusive group of demonstrators that "she sank into what is best described as a clinically catatonic state in the clinic's front waiting room." *Id.* at 279.

Patients exposed to protestors experienced a "fight-or-flight" reaction, especially when the demonstrators approached closely. J.A. 220, 273. Evidence of such a reaction observed on patients included pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention. *Id.* at 220-21. Dr. Hern and his staff observed that "when the demonstrators are close to the patients, as when they are blocking the sidewalk for patients, the severity of these reactions increases manyfold." *Id.* at 275.

Dr. Hern's assessment is corroborated by evidence from other clinics where patients encountering similar protests have likewise suffered psychophysical stress and accompanying symptoms. See Cozzarelli & Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. Soc. Clin. Psychol. 404, 406, 421 (1994) (some women show obvious signs of psychological stress (including sweating, palpitations, anger, crying, or hyperventilation) after being subjected to anti-abortion demonstrators; the greater the personal contact women had with the anti-abortion demonstrators, the more upset they became); Hern, *Proxemics: The Application of Theory to*

Conflict Arising From Antiabortion Demonstrations, 12 Population & Env't 379, 380 (1991).[13]

The stress-related symptoms described above complicate an abortion and increase its risks. See J.A. 273. For example, urinary retention makes it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in the preoperative evaluation. *Id.* at 221, 273; Hern, *supra* at 380-81. Hyperventilation can lead to agitation and muscle spasms, making it more difficult for patients to remain still during medical treatment, and thus increasing the risks of complications such as perforating the uterus during the performance of an abortion. J.A. 221, 273-74. Hyperventilation also can lead to uncomfortable sensations, which can heighten anxiety, and lead to loss of consciousness if a vasovagal syndrome (a transient vascular and neurogenic reaction to emotional stress, and marked by pallor, nausea, sweating, and a rapid fall in blood pressure) occurs. Hern, *supra* at 380-81.

Studies of patients who have undergone abortions have shown that tension affects the degree of pain experienced and

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[13] *See also* Hern, *supra* at 382; *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 758 (1994) (trial court found that protests "took their toll on the clinic's patients"); *Planned Parenthood Shasta-Diablo, Inc.*, 898 P.2d at 411 ("physical confrontations with protestors moments before receiving medical treatment, including surgical procedures, subjected patients to heightened stress and anxiety"); *Operation Rescue-National*, 975 S.W.2d at 551 ("patients would enter clinics visibly shaken, crying, and nervous"); *Pro-Choice Network*, 799 F. Supp. at 1427 (women targeted during demonstrations "usually enter the medical facilities visibly shaken and severely distressed").

the difficulty of the procedure itself.[14] This finding is consistent with other studies of stress and its effects on surgery patients.[15] "In general, high preoperative fear or stress is predictive of a variety of poorer outcomes, including greater pain, longer hospital stays, more postoperative complications, and poorer treatment compliance." Kiecolt-Glaser et al., *Psychological Influences on Surgical Recovery: Perspectives From Psychoneuroimmunology*, 53 Am. Psychol. 1209, 1214 (1998). If a patient becomes agitated before or during the procedure, "she could easily experience serious complications of the abortion that would be extremely unlikely under other circumstances." Hern, *supra* at 381.

Some of these complications stem from the use of anaesthesia.[16] Patients exhibiting signs of heightened anxiety often require higher levels of sedation. See *Operation Rescue-National* v. *National Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 551 (Tex. 1998). Increasing the level of sedation in turn increases the risk of the surgery.[17] Indeed, Dr. Hern stated in his affidavit that on several occasions a patient's anxiety-related symptoms were so great that it was necessary to delay surgery. J.A. 220. With such delay also comes increased risk of complications. See Cates, et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 268 (1977) ("*any* delay increases the risk of complications"); see also *Pro-Choice Network* v. *Project Rescue*, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992).

2. Protest Activities Directed At Clinic Staff.

Anti-abortion protestors target not only patients but also patient escorts, clinic employees, and volunteers. Their assaults have subjected all these persons to significant stress, placed them at a risk of experiencing mental health problems, and reduced the availability and quality of medical services.

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[14] Kay, *Psychological Preparation for a Potentially Stressful Medical Procedure* 32 (1984) ("high levels of preoperative anxiety in abortion patients are associated with greater pain and discomfort during the abortion procedure, when compared with moderate levels of anxiety").

[15] Levine et al., *Failure Hurts: The Effects of Stress Due to Difficult Tasks and Failure Feedback on Pain Report*, 54 Pain 335, 336 (1993); Manyande et al., *Anxiety and Endocrine Responses to Surgery: Paradoxical Effects of Preoperative Relaxation Training*, 54 Psychosomatic Med. 275, 283 (1992).

[16] "[A] person's pre-operative emotional, cognitive and cardiovascular state influences the induction of anaesthesia, operative problems and short-term recovery. . . . High levels of heart rate and blood pressure immediately prior to the induction of anaesthesia is a clinically undesirable state which determines induction, operative and post-operative outcomes."

(continued...)

[16](...continued)
Abbott & Abbott, *Psychological and Cardiovascular Predictors of Anaesthesia Induction, Operative and Post-operative Complications in Minor Gynaecological Surgery*, 34 Brit. J. Clin. Psychol. 613, 621 (1995).

[17] *See* Hern, *Abortion Practice* 35-37 (1984) (general anesthesia is associated with a two- to four-fold increase in first-trimester abortion fatalities, and significant increases in uterine perforation, cervical injury, blood transfusions and corrective major surgery); Lawson et al., *supra* at 1371 ("[T]he majority of the deaths [from legal abortions] in 1983 through 1987 were associated with general anaesthesia during the first trimester, a time usually associated with lowest overall risk."); Meyer, *supra* at 688 (noting that, in cases of "[u]nexplained cardiovascular reactions and fatalities" associated with local anaesthesia, "[i]mportant factors are fear, anxiety and stress").

The testimony before the Colorado General Assembly included accounts of patient escorts being physically assaulted numerous times by protestors at medical facilities. J.A. 93-94. Protestors attempting to block patients' access to a clinic would surround escorts (who, in turn, were surrounding the patients and their family members). These protestors "would push, they'd shove. Sometimes, they'd lose control and they'd bite us and kick us and pinch us." *Id.* at 94. One escort testified that she was hit by men twice her size while trying to get 12 and 13-year-old patients into a clinic. *Id.* at 105. See also *id.* at 225 (escorts were "shoved and hit by demonstrators trying to reach the patients").

Workers were also subject to considerable verbal harassment and abuse. Screaming protestors called clinic staff "murderers," J.A. 153, 223, or "guards from Dachau," *id.* at 69, and threw placards in their faces. *Id.* at 70. On one occasion, as a nurse drove away from the clinic on her first day of work, a picketer leaned into her car and called her a "baby-killing bitch." *Id.* at 152.

The experience of clinic workers in Colorado is comparable to that reported in the literature. In a recently published study based on data collected in 1995, workers at abortion clinics in a Southeastern state reported considerable exposure to violence. Fitzpatrick & Wilson, *Exposure to Violence and Posttraumatic Stress Symptomatology Among Abortion Clinic Workers*, 12 J. Traumatic Stress 227 (1999). Over 90% of the workers reported that they were yelled at by protestors, over 50% were threatened and 18% were pushed or shoved. *Id.* at 235. Six percent reported being punched, slapped or kicked by protestors. *Id.* Nearly three times as many workers reported witnessing other workers being physically assaulted than being victims themselves. *Id.*

This extraordinary level of threats and violence against clinic workers continues a longstanding trend. For example, a 1988 study found that the "continued harassment of abortion providers and their patients is a problem that no other medical care providers encounter." Henshaw, *supra* note 4, at 252. Studies of clinic personnel have found that employee levels of distress are highly correlated with protest activities at the clinics, with the highest levels of distress typically being reported by those who work at clinics experiencing the most protest activities.[18] Indeed, even health care providers who have not suffered direct attacks experience heightened fear when other providers are attacked, and are thus primed to take seriously any implied or overt threats directed at them. Boyd at 57-58.

The present case graphically illustrates these effects. Exposure to protest activities resulted in clinic staff members and volunteers feeling threatened and intimidated, particularly when surrounded by demonstrators at close range. J.A. 229. One volunteer testified that serving as an escort "was a truly frightening experience . . . . We were sorely afraid for our physical safety." *Id.* at 90.

These adverse effects on health care providers also adversely affect patient welfare. See J.A. 236 ("acts of violence and threats of violence might be expected to create an atmosphere of uncertainty and fear that can potentially affect not only workers and their mental health status, but also the work being performed"); Henshaw, *supra* p. 5, at 58 (harassment affects the ability of facilities to offer services). In addition to driving experienced physicians out of the practice, harassment and intimidation discourage younger physicians

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[18] Halvorson Boyd, *Surviving a Holy War: How Health Care Workers in U.S. Abortion Facilities Are Coping With Antiabortion Harassment* 72 (1990) ("Boyd").

from entering the field, thereby reducing the availability of abortion services. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstet. & Gynec. 719, 721 (1992). Indeed, eleven percent of nonhospital providers have reported that physician shortages and other staffing problems reduce their ability to provide abortion services. Henshaw, *supra* p. 5, at 59.

SUMMARY OF ARGUMENT

"The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949)). The Colorado statute challenged here is constitutional precisely because it provides petitioners and others ample opportunity to reach the minds and attention of willing listeners, yet also provides a narrow corridor of safe passage for unwilling, captive listeners.

The record before the Colorado General Assembly documents how persons seeking to enter or leave medical facilities in Colorado are regularly confronted with aggressive, harassing, and intimidating confrontations that threaten their health and safety. Because medical care can safely be provided only in licensed medical care facilities, persons seeking to receive or provide such care have no choice but to use the entrances to these facilities. They cannot avoid these assaults by walking away; they require the protection of the state.

Section 18-9-122(3) is a reasonable and narrow response to this serious problem of public health and safety. The only conduct it prohibits is a very close approach to an unwilling listener near the entrance to a medical facility. It

permits protesters to approach up to eight feet from any person, which is close enough to permit oral expression in normal conversational tones, to display signs or literature, and to capture the attention and mind of any interested person. By guaranteeing all persons a narrow path to enter and leave a medical facility without being surrounded, bullied, and harangued at very close range, the statute minimizes the adverse psychological and physiological impact, and consequent health risks, that such close and threatening conduct poses for those who seek to obtain and provide care at medical facilities.

ARGUMENT

The Colorado statute is content-neutral. It advances not only significant but compelling state interests in protecting health and safety that lie at the core of the state's police powers. In so doing, it imposes only the most modest restriction on the place where petitioners can position themselves, and one that is entirely appropriate given the nature of a health care facility. It is thus a reasonable restriction on the place of speech.

A. The Statute Regulates The Place, Not The Content, Of Speech.

This Court has repeatedly made clear that the "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 759, 763 (1994) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). In conducting that inquiry, the critical question is whether the government is attempting to "'regulate [speech] based on hostility--or favoritism--towards the underlying message expressed.'" *Id.* (alteration in original) (quoting *R.A.V.* v. *St. Paul*, 505 U.S. 377, 386 (1992)). In short, to assess content-

neutrality, the Court will "look to the government's purpose as the threshold consideration." *Id.*

There is no evidence that any "invidious content- or viewpoint-based purpose motivated" the Colorado legislature. *Id.* Rather, Colorado's evident purpose was to further its compelling interests in protecting the health and safety of its citizens. Pet. App. 25a-26a. This statute secures for all citizens a narrow pathway to the entrance of a medical facility, which they can travel without fear of being accosted by a protester, demonstrator, educator, or counselor. At the same time, the statute permits petitioners and others to surround their targets with signs, demonstrations, and armfuls of literature, and to speak or scream whatever they wish.

The statute thus applies equally to, and permits, every conceivable expression of viewpoint on any issue about which a "viewpoint" might be had, including those that would be deeply offensive and wounding to those hearing them. Neither petitioners nor their *amici* contend that this facially neutral statute promotes any concealed invidious motive. As the Court reasoned in *Madsen*, the fact that the statute may cover "people with a particular viewpoint does not render the [statute] content or viewpoint based." 512 U.S. at 763; see *Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988). Its only impact is to regulate the place where such expression occurs.

Petitioners and their *amici* nevertheless assert that the statute is content-based. Their sole explanation is that "the content of oral speech must be taken into account in determining whether the statutory ban is violated." Pet. Br. 31.[19]

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[19] *See* ACLU Br. 10-11 (application of statute "clearly turns on the content of what is being said"; "inescapable need to refer to content in applying (continued...)

That sweeping test is inconsistent, however, with the Court's repeated focus on the justification and purpose of the government's action, see *Madsen* and the cases cited therein, and was squarely rejected in *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48-50 (1986). It is also unsupported by the cases on which petitioner and their *amici* rely. For example, petitioners recite the Court's statement that "'it is the content of the speech that determines whether it is within or without the statute's blunt prohibition.'" Pet. Br. 32 (quoting *Carey* v. *Brown*, 447 U.S. 455, 462 (1980)). But in context, it is plain that the Court in *Carey* was concerned about an ordinance that permitted speech on certain controversial issues but not others. *Carey* v. *Brown* involved an ordinance that "generally bar[red] picketing of residences or dwellings," but created an exemption for peaceful picketing "on one particular subject" -- labor disputes. 447 U.S. 455, 457, 461 (1980). The Court therefore found the ordinance comparable to the one it had invalidated in *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972), because in each case the government had "'select[ed] which issues are worth discussing or debating in public facilities.'" *Carey*, 447 U.S. at 463 (quoting *Mosley*, 408 U.S. at 95-96). The Court thus did not find the ordinance invalid merely because of an "inescapable need to refer to content in applying it" (ACLU Br. 11) or because "the content of oral speech must be taken into account in determining whether the statutory ban is violated." Pet. Br. 31.

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[19](...continued)
the Colorado statute"); AFL-CIO Br. 16 n.7 (relying on *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972)). We express no view on whether petitioners may properly raise the issue of content-neutrality in this Court; *cf.* Pet. App. 11a, 21a (petitioners did not argue content-neutrality issue before the Colorado Supreme Court).

Here, unlike the statutes in *Carey* or in *Mosley*, the Colorado statute does not select any issue for preferential (or disfavored) treatment. It treats all expression of any viewpoint on any issue uniformly. Indeed, the state contends that the language of the statute is broad enough to reach any oral expression, and that the Colorado Supreme Court may be held to have adopted that view. Under such a construction (which this Court also could adopt[20]), any argument that the statute embodies a content-based distinction evaporates.[21]

To the extent the statute draws any line, it is between expression of a view on any issue (which is covered) and incidental oral expression, such as a greeting or an inquiry as to time of day or for directions. Such a line does not select between issues, but rather carves out an exception for the sort of non-threatening, presumptively consented-to interactions that contain no substantive issue-related content whatsoever. Because that line reflects only the legislature's proper purpose to minimize the intrusion of the ordinance on speech, rather than any "invidious content- or viewpoint-based purpose" to promote or suppress one viewpoint or issue at the expense of another, the statute is content-neutral. *Madsen*, 512 U.S. at 763.

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[20] *See Frisby* v. *Schultz*, 487 U.S. 474, 482-83 (1988); *United States* v. *Grace*, 461 U.S. 171, 176 (1983).

[21] Such a construction would not result in an overly broad statute. Although the statutory reference to "oral protest, education, or counseling" would, on this construction, cover oral inquiries about the time of day or for directions, the statute would not operate in practice to prohibit or punish them. Such innocuous, unthreatening inquiries are presumptively ones to which any person would, and may be deemed to, consent.

B. The Statute Serves Compelling Government Interests.

A content-neutral statute, such as the Colorado statute challenged here, must serve a significant governmental interest. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796 (1989); *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992). The Colorado statute easily satisfies this test. It serves two broad interests, each of which is fundamental to the state's exercise of its historic police power.

First, the statute serves the state's interest in protecting the health of its citizens by ensuring them reasonable access to health care facilities. The Colorado General Assembly identified this interest in the first section of the statute (see Colo. Rev. Stat. § 18-9-122(1)), and the Colorado Supreme Court relied upon it in upholding the statute. Pet. App. 26a. The compelling need for protective regulation at the entrances to health care facilities was dramatically set forth in testimony before the General Assembly; that testimony, in turn, is fully consistent with evidence, reports, and findings from researchers and proceedings nationwide of the significant threat to public health posed by demonstrations, protests, and counseling at close range to patients near the entrance to medical facilities. See pages 6-11, *supra*. For example, such activities deter patients from entering the facilities and delay treatment; discourage staff from continuing to work at the facilities; and traumatize those patients who do enter the building, all of which serves to increase the risks of adverse outcomes from the treatment. *Id.*

Second, the statute promotes the state's interest in protecting the safety of its citizens. The record before the Colorado General Assembly was replete with testimony about "hostile, and sometimes violent confrontations" near the

entrances to health care facilities. Pet. App. 6a. The testimony described incidents of physical assaults, intimidation, and threats that made patients fear for their physical safety, and that occurred in the midst of such a crush of demonstrators that identifying particular perpetrators was difficult. *E.g.*, J.A. 93-95, 159, 218-30. It is a basic function of state government to respond to a pattern of conduct that threatens the personal safety of its citizens.

Petitioners concede that these are significant government interests. See Pet. Br. 35; Pet. App. 25a-26a; see also ACLU Br. 9 ("There is no doubt that the state has a significant government interest in ensuring that women (and men) have unimpeded access to health care facilities"). Even though the legal point is conceded, these interests ought not be glossed over, for they are not only significant, but compelling.

The state's interest in regulating speech that threatens health and safety near the entrances of medical facilities is compelling because individuals are not free to walk away from that speech. Those entrance areas are choke points. Sidewalk counselors and other demonstrators know that individuals seeking to obtain or provide medical care must use them; it precisely for this reason that they target these areas for their abusive activity. The targeted individuals cannot avoid the documented adverse medical consequences and invasion of medical privacy by going elsewhere, nor can they avoid the sense of fear or terror of a potential physical assault when sidewalk counselors and others are free to accost, surround, harangue, and scream at them at close range as they attempt to enter a medical facility.

An individual seeking to receive or provide medical attention is thus a classic captive audience. This Court has made clear that states have an overriding interest in regulating

offensive or coercive speech imposed upon a captive audience. In *Lehman* v. *City of Shaker Heights*, for example, the Court upheld a *content-based* ban on political advertising in the public transit system because:

> "[t]he streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting). In such situations, "[the] legislature may recognize degrees of evil and adapt its legislation accordingly." *Packer Corp. v. Utah*, 285 U.S. [105,] 110 [(1932)].

418 U.S. 298, 302 (1974). See also *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 738 (1970) ("That we are often 'captives' outside . . . the home and subject to objectionable speech and other sound does not mean we must be captives everywhere."). Moreover, unlike the captive audience on the streetcar, an individual seeking medical care, particularly medical care relating to reproductive matters, has important interests in privacy and anonymity,[22] and is "practically helpless to escape th[e] interference with his [or her] privacy" (*Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949)) that results from conduct such as that in which petitioners seek to

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[22] *Cf. Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 767 (1986) (invalidating reporting requirements because they "raise[d] the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy"); *Bellotti* v. *Baird*, 443 U.S. 622, 655 (1979) ("[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties") (Stevens, J., concurring in judgment).

engage.[23] In numerous cases, the Court has upheld bans on speech, including picketing targeted at a person's home, the use of sound trucks in residential neighborhoods, and indecent language over the radio waves, because the means of communication and the content of the speech itself invaded substantial privacy interests in an inescapable and intolerably intrusive manner. See *Frisby*, 487 U.S. at 484-85; *Kovacs*, 336 U.S. at 86-87; *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748-49 (1978); *Rowan*, 397 U.S. at 738. The state's interest is particularly compelling here, therefore, because it seeks to protect individual interests in privacy and anonymity, as well as health and safety, in a context in which individuals, absent state intervention, are unable acting alone to protect those interests.

C. The Statute Is Reasonably Tailored To Protect The State Interests At Stake And Leaves Open Ample Alternative Channels Of Communication.

Finally, the Court must examine "the fit between the [objectives of the statute] and the restrictions it imposes on speech . . . ." *Madsen*, 512 U.S. at 765. The test for a content-neutral restriction on the time, place, and manner of speech is well-established. Such a statute must be reasonably tailored to serve a significant governmental interest, and must leave open ample alternative channels of communication. *Ward*, 491 U.S. at 796; *Burson*, 504 U.S. at 197.

Petitioners and their *amici* quarrel with this Court's holding in *Madsen* that "a somewhat more stringent application

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[23] This is particularly true in the case of abortion, which is not a widely offered procedure. Henshaw, *supra* note 4, at 252. Indeed, nearly ten percent of women who obtain abortions must travel more than 100 miles to do so. *Id.*

of general First Amendment principles" applies to review of an injunction as opposed to "a generally applicable ordinance." 512 U.S. at 764-65. But they offer no arguments in support of their disagreement that were not considered, and rejected, by the Court in *Madsen*. Compare Pet. Br. 26-27 n.18 and ACLU Br. 8 with *Madsen*, 512 U.S. at 764-67.

Moreover, their arguments overlook the fact that while *Madsen* posited a statute that merely promoted "particular societal interests," *id.* at 764, the statute at issue here promotes interests that lie "at the core of the State's police power." *Kelley* v. *Johnson*, 425 U.S. 238, 247 (1976). The exercise of police power to protect public health and safety has historically been a matter for state concern, *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985), and consequently the "'States traditionally have had great latitude under their police powers to legislate so as to protect the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 756 (1985)). Thus, a state should be permitted significant latitude to impose time, place, and manner restrictions that further its core interests.

In any event, the statute here is so narrowly tailored, and leaves open so many channels of communication, that it would pass muster even under far stricter scrutiny than is appropriate to this content-neutral exercise of police power. Despite their best efforts, petitioners and their *amici* fail to identify any significant limitation on expressive activity that flows from the statute they challenge. Their case is grounded only in rhetoric and in repeated invocations of First Amendment formalisms, not in real threats to freedom of speech.

The statute has so many speech-preserving limitations that they are difficult to summarize in a single sentence. But in general, the only activity the statute prevents petitioners from conducting is knowingly approaching closer than eight feet to someone who is within 100 feet of the entrance to a medical facility. Even that modest place-restriction is not absolute. Petitioners can *be* closer than eight feet so long as they are standing or sitting still; moreover, petitioners can even knowingly *approach* closer than eight feet, so long as their target consents and, beyond 100 feet from the entrance to the healthcare facility, no restrictions apply at all.

The statute thus permits petitioners and others to be close enough to speak to their targeted audience in normal conversational tones, if they so choose, or to scream and yell (and be understood to be screaming and yelling), if they prefer. It also permits them to display posters at close range that can easily be seen by the target audience. And it permits them to display and make available handbills within two or three steps of any passerby, and to approach and hand them to any person who signals that he or she wants them. These not only are "ample alternative channels of communication," but also they represent virtually every conceivable non-coercive channel of communication that petitioners could use outside a medical facility.

What is foreclosed? Petitioners dramatically claim that "*all handbilling* within one hundred feet of the entrance doors to every Colorado health care facility would be banned under the statute." Pet. Br. 43 (emphasis in original). That is not so. It may be that the statute "precludes handbilling in its normal sense" by forbidding unconsented approaches (AFL-CIO Br. 7), but the consequent intrusion on First Amendment values, if any, is very slight. The First Amendment gives no one the right to place a handbill in someone else's hand. *Kovacs*, 336 U.S. at

87 (passer-by "may be offered a pamphlet in the street but cannot be made to take it.").

The only question with respect to handbilling, therefore, is whether it is unconstitutional, near the entrance to a medical facility, to make mobile handbillers stay eight feet away from unwilling recipients of handbills. It plainly is not. Indeed, the Court has upheld a far more restrictive place-regulation, which prevented any distribution of "'printed or written material'" at a fairgrounds except from a "'duly licensed location.'" *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 643 (1981) (quoting Minnesota State Fair Rule 6.05). Moreover, the Court upheld that more restrictive ban on handbilling because it furthered the state's interest in avoiding "widespread disorder at the fairgrounds"; that interest, while significant, is far less compelling than the documented need to protect health and safety immediately outside of medical facilities that led the Colorado General Assembly to enact this statute.

The Colorado statute is also far more narrowly tailored than the 300-foot no-approach zone struck down in *Madsen*. See Pet. Br. 26. Far from banning any undefined "approaches" within a broad 300-foot area in front of an entrance, the Colorado statute permits approaches up to eight feet from any person, and thereby allows the kind of "peaceful" contact that the broad and ambiguous *Madsen* injunction foreclosed. *Madsen*, 512 U.S. at 774. Indeed, the Colorado statute allows much closer approaches than the "cease and desist" provision upheld in *Schenk* v. *Pro-Choice Network of Western New York*, which required protesters to withdraw to a distance of 15 feet from those who did not consent to their approach. 519 U.S. 357, 384 & n.12 (1997). Similarly, because a protester can comply with the Colorado statute simply by standing still, and because the statute has a scienter requirement that prohibits

only knowing approaches, the statute's narrow 8- foot buffer is also far more clearly defined and easy to comply with than the vague 15-foot buffer that was "quite difficult for a protester" to "know how" to comply with, and that was therefore struck down in *Schenk*. *Id.* at 378.

The modest limitation on handbilling imposed by the statute is thus fully consistent with, and more narrow than, other limitations that the Court has previously upheld. And apart from that limitation, neither petitioners nor their *amici* identify any other specific impact on their ability to speak. The Court will search their briefs in vain for any concrete description of the significant, unnecessary restrictions on speech that they claim the statute imposes. The reality is that anything that they wish to say to someone immediately outside the entrance to a health care facility can be said as easily from eight feet away as from one, and any sign that they wish to display can be seen as easily from eight feet as from one. Indeed, the record suggests that petitioners' messages are more effective when delivered at an even greater distance.[24] The Colorado statute thus grants all persons ample "opportunity to win [the] attention" of those near clinic entrances and to "reach the minds of willing listeners" with words, signs, and even handbills. *Kovacs*, 336 U.S. at 87. The Constitution requires no more.

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[24] Research has shown that cognitive performance is decreased during a "personal space invasion," i.e., "when an encroacher violates the norms of interpersonal distance by approaching too closely where the subject does not expect or desire to interact with the potential invader." J.A. 286-87 (citing Worchel et al. (1976 & 1979)). In a study comparing persuasive, verbal communication at distances of two feet, six feet and fifteen feet, fifteen feet was found to be the "optimal distance for changing someone's attitude." *Id.* at 287 (citing Albert & Dabbs (1970)). "At closer distances, the participants seemed distracted by the presence of the persuader because they felt unduly pressured." *Id.*

Rather than point out concrete restrictions, petitioners and *amici* offer abstract complaints about overbreadth. First, petitioners note that the statute is not limited to those entering or leaving a health care facility, but extends to "every human being within 100 feet of the entrance to any health care facility in Colorado." Pet. Br. 40. While that is true, there is also no evidence that it is significant. The number of affected people is likely to be small (because few who are not seeking to enter or leave the facility are likely to come near the entrance during a demonstration), and petitioners are free to approach those who do once they pass further than 100 feet from the entrance (which they will do since these are individuals who, by hypothesis, are not seeking to enter the facility).

Second, petitioners and *amici* note that the statute applies to all protesters, regardless of whether they previously have been found guilty of violating the law or whether their actual up-close solicitations would be perceived by a patient to be intimidating or hostile or would serve to impede their access to the facility. Pet. Br. 41 n.33; ACLU Br. 22; AFL-CIO Br. 10-11. Such scope, however, is inherent in any effort to address a threat to public health and safety through legislation rather than injunction. Moreover, the record contains ample evidence to support the state's concern that, however well-intentioned petitioners or others may believe themselves to be, their zealousness in wishing to intercept their targets near clinic entrances, and their dogged persistence in providing unwanted counseling at the closest possible range without physically blocking a person's progress toward the door, creates a distinct and significant threat to public health and safety.[25]

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[25] *Cf. American Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921) ("the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view

(continued...)

Finally, petitioners and their *amici* argue that section 18-9-122(3) is superfluous because the statute "already deals with obstruction in another section." ACLU Br. 22; see Pet. Br. 42 (citing Colo. Rev. Stat. § 18-9-122(2), which outlaws conduct by a person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility."). But the two provisions do not overlap; they are complementary and mutually reinforcing. As another of petitioner's *amici* points out, "there is nothing intrinsically obstructive in the leafletting, handbilling, sign display, and oral protest modes of communication at less than eight feet from the intended addressee." AFL-CIO Br. 13. The record before the Colorado General Assembly shows that such modes of communication, at less than eight feet from the intended addressee, have tended to intimidate, harass, and upset persons attempting to enter or leave health care facilities, and it is clear that such conduct adversely affects patient health and the ability of health care professionals to treat patients. See pages 6-11, *supra*. The record also reflects the Assembly's concern that attempts to enforce a law more narrowly limited to only those non-obstructive approaches that had the effect of intimidating or harassing an individual would be difficult to enforce given the swirling crowds that result when groups of protesters generally are permitted closely to approach unwilling, captive listeners. See J.A. 117, 124-25.

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[25](...continued)
to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all this the person sought to be influenced has a right to be free . . . .").

At bottom, petitioners' and their *amici*'s concerns about improper tailoring are unpersuasive because they fail to take seriously (or for the most part even to discuss) the state's exceptional interest in ensuring citizens safe passage into and out of every health care facility. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); see *id.* at 120 (noisy demonstration incompatible with school activities); *Frisby*, 487 U.S. at 480-81 (focused picketing incompatible with tranquility of private residence); *United States* v. *Kokinda*, 497 U.S. 720, 732 (1990) (solicitation incompatible with business of post office); *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966) (demonstration incompatible with jail grounds); *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (picketing incompatible with administration of justice at courthouse).

Conduct that interferes with the safe and effective provision of medical services is fundamentally incompatible with the nature and function of a medical facility. Indeed, *amici* submit that the nature of a medical facility raises public health and safety concerns that match or exceed the interests implicated in the public school, post office, jail, courthouse, or public bus settings.[26] See *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 781-85 (1979); see *id.* at 791 (Burger, C.J., concurring in judgment) ("I would think no 'evidence' is needed to establish the proposition that the primary mission of every

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[26] That the activities in question are conducted in the traditional public forum of a sidewalk is not dispositive. This Court has upheld restrictions on expressive conduct on sidewalks that is incompatible with the normal activity of a particular place adjacent to the sidewalk. *See Frisby*, 487 U.S. at 480-81; *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-17 (1972).

hospital is care and concern for the patients and that anything which tends to interfere with that objective cannot be tolerated."); *Roe* v. *Wade*, 410 U.S. 113, 150 (1973) (government has a compelling interest in seeing that any medical procedure is performed under circumstances that insure maximum safety for the patient); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment); *Dallas County Hosp. Dist.* v. *Dallas Ass'n of Community Orgs. for Reform Now*, 459 U.S. 1052, 1052-55 (1982) (Rehnquist, C.J., dissenting from denial of certiorari). The statute here, which is aimed directly at promoting patient welfare and reducing medical risk, and which only narrowly restricts the place where protesters can stand to express themselves and in no other way limits their ability to attract the attention of listeners, is a reasonable and measured response to a serious public health problem. It should therefore be upheld as constitutional.

CONCLUSION

For the reasons stated above, the decision of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

Ann E. Allen
American College of Obstetricians and Gynecologists
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

Michael L. Ile
Leonard A. Nelson
American Medical Association
515 North State Street
Chicago, IL 60610
(312) 464-4600

Carter G. Phillips
Mark E. Haddad*
Lee L. Auerbach
Sidley & Austin
1722 Eye Street, N.W.
Washington,D.C. 20006
(202) 736-8000

*Counsel of Record

Counsel for Amici Curiae

December 13, 1999

APPENDIX

H-5.997 Violence Against Medical Facilities and Health Care Practitioners and Their Families

The AMA supports the right of access to medical care and opposes (1) violence and all acts of intimidation directed against physicians and other health care providers and their families and (2) violence directed against medical facilities, including abortion clinics and family planning centers, as an infringement of the individual's right of access to the services of such centers.

(Res. 82, 1-84; Reaffirmed by CLRPD Rep. 3-1-94; Res. 422, A-95)

DEC 13 1999

(15)

No. 98-1856

Supreme Court, U.S.
FILED
DEC 13 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,

Petitioners,

V.

THE STATE OF COLORADO BILL OWENS, GOVERNOR, ET AL.,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

AMICI BRIEF OF THE CITY OF BOULDER AND THE CITY AND COUNTY OF DENVER IN SUPPORT OF RESPONDENTS

Joseph N. de Raimses
City Attorney
Coloradon Registration No. 2512
P.O. Box 791
Boulder, Volorado 80302
(303) 441-3020

Daniel E. Muse, City Attorney
Colorado Registration No. 6229
James C. Thomas, Assistant City Attorney
Colorado Registration No. 13583
(Counsel of Record)
303 West Colfax Avenue
Denver, Colorado 80204
(720) 913-8050

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INTEREST OF AMICI

The City and County of Denver, Colorado, and the City of Boulder, Colorado, each have numerous healthcare facilities, several of which have been the targets of sustained protest and demonstration activities. These demonstrations often make it difficult or impossible for patients to receive healthcare services. In response to this problem both Cities adopted an ordinance similar in content, and purpose, to the statute that is the subject of this litigation. The interests of residents of these Cities will be substantially and adversely affected by any decision that serves to weaken the protections afforded them by Colorado Revised Statute 18-9-122.[1]

SUMMARY OF ARGUMENT

This court directed the Colorado Court of Appeals to reconsider its decision affirming the validity of a statute adopted by the Colorado General Assembly, C.R.S. §18-9-122, in light of this court's decision in *Schenck v. Pro-choice Network of Western New York*, 519 U.S. 357 (1997). After completing its review, the Colorado Court of Appeals affirmed

[1] This brief is filed pursuant to Rule 37.4 on behalf of the City of Boulder by its City Attorney Joseph N. de Raimses and the City and County of Denver by its City Attorney Daniel E. Muse through Assistant City Attorney James C. Thomas (Counsel of Record). In accordance with this rule no consent to file the Amicus Brief was sought from the parties and no motion to file an Amicus Curie Brief was presented to the court.

the trial court's judgment upholding the provisions of the statute. After granting certiorari the Colorado Supreme Court likewise affirmed the decision holding that the statute was a content neutral time, place and manner restriction that was narrowly tailored to serve a significant government interest that left open ample alternative channels of communication.

The Colorado Supreme Court was correct in rejecting *Schenck* as the applicable standard for review because that case involved a judicially created injunction rather than a generally applicable statute. Injunctions deserve a higher standard of review because they present a higher risk of censorship and discriminatory application than do general ordinances or statutes.

The standard for reviewing a statute is set forth in *Ward v. Rock Against Racism*, 419 U.S. 781 (1989). Specifically, the standard is that a regulation may impose reasonable restrictions on the time, place or manner of protected speech if the restrictions are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. The applicability of this standard was affirmed in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994).

The standard established in *Ward, supra* is only appropriate if the statute is content neutral, and this statute is. This statute serves purposes unrelated to the content of the

expressive conduct. It is clear that the legislation is to be generally applicable for the protection of the health and safety of citizens seeking to obtain healthcare services. Its intent is to address threatening conduct and obstructive behavior irrespective of the content of the speech, making this legislation content neutral.

This statute is narrowly tailored to serve a significant governmental interest. It imposes limited restrictions on speech activities that occur within 100 feet of the entrance to a healthcare facility. Within this 100 foot radius of the entrance to a healthcare facility, the statute prohibits an individual from (1) knowingly approaching another person within eight feet, (2) for the purpose of oral protest, counseling, education, leafleting, or displaying a sign to that person, (3) without that person's consent. The knowingly requirement eliminates the inadvertent or accidental violation of the statute that created problems for the *Schenck* injunction. This eight foot "bubble" of protection is substantially narrower then the fifteen foot and 36 foot areas imposed by *Scheck, supra* and *Madsen, supra*. This eight foot distance also permits protest activity occurring in conversational tones. In fact, there is evidence that a protest message is more likely to be received and accepted from a distance of eight feet then it would be if delivered from closer proximity.

The Colorado General Assembly heard extensive testimony from witnesses who described the substantial negative impact of protest activity on patients attempting to obtain healthcare services. After balancing the privacy interests of patients against the right to peacefully protest, the Colorado General Assembly adopted C.R.S. §18-9-122 in an effort to preserve the health and safety of Colorado citizens. The cases of *Schenck, supra* and *Madsen, supra* both recognize this as a legitimate governmental interest.

This statute is not a general ban on speech, but simply restricts the place and manner in which the speech activity can be conducted. A violation occurs only if a demonstrator knowingly approaches a target without their consent. The statute presents no other restrictions, therefore, it leaves open ample alternative avenues of communication.

An individual who utilizes the safeguards provided in this statute is protecting their own safety, they do not restrict the content or the delivery of the message to any other individual. There is no governmental action involved in a patient's refusal to allow a protestor to approach within eight feet of them, therefore, there is no censorship involved. This lack of governmental action also negates the petitioner's arguments concerning licensing schemes to accomplish censorship.

The statute uses plain, concise language to establish guidelines for conduct. It is clear what behavior is prohibited. The statute is entitled to a presumption of constitutionality and is not void for vagueness.

The Decision of the Colorado Supreme Court should be affirmed.

ARGUMENT

I. THE COLORADO SUPREME COURT WAS CORRECT IN ITS DECISION TO UPHOLD C.R.S. §18-9-122.

A. Introduction

This matter has previously been before this Court and was remanded to the Colorado Court of Appeals for reconsideration in light of this court's decision in *Schenck, supra.*

On remand, the Colorado Court of Appeals requested briefs from the parties relative to the impact of *Schenck, supra,* on C.R.S. §18-9-122. The Colorado Court of Appeals reviewed and considered the submissions and affirmed the trial court's judgment upholding the provisions of C.R.S. §18-9-122. In particular, the Colorado Court of Appeals found that "Schenck does not compel the conclusion that section 18-9-

122 violates the first amendment." *Hill v. City of Lakewood,* 949 P.2d 107 (Col. App. 1997). Pet. App. 57a.

After granting Certiorari, the Colorado Supreme Court affirmed the decision of the Colorado Court of Appeals and stated in conclusion:

> Thus, we hold that section 18-9-122(3) is a valid time, place and manner restriction, a permissible legislative response designed to assure safety and order for citizens entering and leaving Colorado healthcare facilities. It is content neutral, is narrowly tailored to serve a significant governmental interest, and leaves open alternative channels of communication. Accordingly we affirm the judgment of the Court of Appeals. *Hill v. Thomas,* 973 P. 2d 1246 (Colo. 1999). Pet. App. 29a.

It is this ruling that is presently before this court for review.

B. Standard for review.

In *Schenck, supra* an action was brought by several doctors and medical clinics in upstate New York seeking a preliminary injunction against anti-abortion protestors who were engaged in allegedly illegal activities intended to prevent individuals from obtaining abortions. An injunction was issued by the New York court and the protestors challenged the constitutionality of the injunction. The protestors alleged violations of their First Amendment Rights challenging a

"floating" fifteen foot buffer zone around people and vehicles entering and leaving the clinics, the "fixed" fifteen foot buffer around the clinic's doorways, driveways, parking lot entrances, and the "cease and desist" provisions of the injunction that forced anti-abortion protestors to retreat to fifteen feet from the targeted person.

In *Schenck* this Court upheld the "fixed buffer zones" around entrances to clinics, finding them necessary to ensure that people in vehicles trying to enter or exit the clinic property or clinic parking lots could do so. The *Schenck* decision struck down the "floating" buffer zones around people entering or leaving the clinics because they burdened more speech then was necessary to serve the relevant government interest. The Court found that the fifteen foot distance prohibited the protestors delivering their message in a normal conversational tone. Because the floating buffer zones were struck down, the Court did not address the constitutionality of the "cease and desist" provisions of the injunction.

The Colorado Supreme Court carefully considered the *Schenck* decision and, while recognizing factual similarities, concluded that the test applied in that case was not the appropriate standard by which to determine the constitutionality of the statute in question here. *Schenck* involved a preliminary injunction issued by a court against

specific parties in that action. The standard for review of content neutral injunctions adopted in *Schenck* is "whether the challenged provisions of the injunction burden no more speech than is necessary to serve a significant government interest." However the regulation presently before this court for consideration is subject to a different standard because it is a statute adopted by the General Assembly of the State of Colorado for general application to all citizens.

In *Madsen, supra,* this court made a distinction between the standards of review for a generally applicable statute and an injunctive order. *Madsen* held:

> There are obvious differences ..... between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interest. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. See *United States v. W. T. Grant Company,* 345 U.S. 629, 632-633, 97 L.Ed 1303, 73 S. Ct. 894 (1953). Injunctions also carry greater risk of censorship and discriminatory application than do general ordinances.

Injunctions carry this greater risk of censorship and discriminatory application because they impose specific restrictions on the behavior of specifically identified individuals. These issues and concerns are not present when the regulation is a generally applicable statute adopted by a

legislative body to further the well-being of the general public. There is no specific group or individual regulated by a statute, and there is no specific occurrence that is the focus of the statute

Madsen, supra at 764, held that content neutral generally applicable statutes should be evaluated under the standards set forth in *Ward v. Rock Against Racism, supra.* This standard is that a regulation may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

C. The statute is content neutral.

The process of evaluating the validity of any regulation of speech activity requires one to evaluate the content neutrality of the regulation. The *Madsen* decision, *supra,* made reference to the detailed analysis of public forums and their standards for review contained in *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 406 U.S. 37 (1983). The Perry case held:

> ...for the state to enforce a content based exclusion, it must show that its regulation is necessary to serve a compelling state interest

and that it is narrowly drawn to achieve that end. *Carry v. Brown,* 447 U.S. 455, 461 (1980). The state may also enforce regulations of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service v. Counsel of Greenberg Civic Association Assns.*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 535-536 (1980); *Grayned v. City of Rockford*, 408 U.S. 115 (1972); *Campwell v. Connecticut,* 310 U.S. 296 (1940); *Schneider v. State,* 308 U.S. 147 (1939). (Emphases added)

To determine which of these tests apply to C.R.S. 18-9-122(3) one must first determine whether or not this statute is content neutral. Petitioners and Amici argue that the statute's application is content based. Pet. Brf. at 31-32. The Colorado Supreme Court observed that the Petitioners had not raised the issue of content neutrality in their appeal. Pet. App. 21a.[2] Irrespective of the perceived waiver of this issue, the Colorado Supreme Court considered the content neutrality of the statute when it upheld its validity.

[2] Having waived the issue in the Colorado Supreme Court makes it inappropriate for petitioners to raise the issue for consideration by this court.

The controlling consideration in determining content neutrality is the government's purpose in adopting the regulation. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Ward v. Rock Against Racism, supra.*

Colorado Revised Statute section 18-9-122 is entitled: ***Preventing passage to and from a healthcare facility – engaging in prohibited activities near facility.*** The most relevant sections for our review are 18-9-122 (1), (2), (3), and(4). These sections provide:

> (1) The general assembly recognizes that access to healthcare facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a healthcare facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a healthcare facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a healthcare facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a healthcare facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "healthcare facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.[3]

A review of these sections of the statute demonstrates that it is generally applicable irrespective of the content of speech. The title and body of this statute clearly demonstrate that it is directed at the threatening conduct and obstructive behavior that restricts access to healthcare facilities. The statute contains a broad definition of healthcare facility to

[3] The entire text of the statute is contained in Pet. App. 6a-7a.

further assure that it is content neutral. This statute does not serve as a bar to communication and makes no consideration of what the message might be.

The petitioners have taken the inconsistent position that the statute is a content based regulation that prohibits their anti-abortion message, while at the same time alleging that the statute would prohibit "an evangelist distributing gospel tracts, a pizzeria employee distributing discount coupons, or a nurse distributing flyers to explain a strike for improved working conditions, …." Pet. Brf. page 9.

The Colorado General Assembly made no effort to control the content of the speech protected and regulated by the statute. The Colorado Supreme Court was correct in its determination that the statute is a content neutral regulation, and that the standard for review was that contained in W*ard v. Rock Against Racism, supra*.

D. The statute is narrowly tailored to serve a significant governmental interest.

The statute makes it clear that its purpose is to protect a person's right to obtain medical counseling and treatment. In its attempt to further the privacy interests of individuals seeking medical treatment, the Colorado General Assembly carefully balanced this privacy interest against its impact on

free speech. JA 60 and 114. The Colorado Supreme Court in deciding this matter issued an opinion that defines and limits the application of the statute. Pet. App. 24a-25a.

The statute that has been challenged by Petitioners has no impact on any speech activities that occur outside of 100 feet from the "entrance door to a healthcare facility." Within this 100 foot area only a limited amount of specifically described activity is prohibited. Within 100 feet of the entrance of a healthcare facility this statute prohibits an individual from (1) knowingly approaching another person within eight feet, (2) for the purpose of oral protest, counseling, education, leafleting, or displaying a sign to that person, (3) without that person's consent.

This statute restricts only "knowing" acts, thereby, incorporating the well established *mens rea* requirement of "knowingly". This term is readily understandable and is defined in this same title of the Colorado Statutes.[4] Unlike the concerns raised in *Schenck* an individual cannot mistakenly or inadvertently violate this statute. Neither these petitioners nor

[4] **18-1-501. Definitions**. (6) "Knowingly" or "willfully". All offenses defined in this code in which the mental culpability requirement is expressed as "knowingly" or "willfully" are declared to be general intent crimes. A person acts "knowingly" or "willfully with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

any other protestors at a clinic can violate this statute by inadvertently backing up and coming within eight feet of an another individual, or by standing still while an individual passes within eight feet of them.

Additionally, the statute requires the element of "approaching" for there to be criminal culpability. As pointed out by the narrowing interpretation of the Colorado Supreme Court, a petitioner who is standing still within the 100 foot zone does not need to change his or her position to avoid coming within the eight foot distance of an individual who is approaching them. If the *mens rea* requirement of "knowingly" and the *actus reus* requirement of "approaches" do not coincide there is no violation. Pet. App. 24a.

The eight foot restriction imposed by this statute is more narrowly tailored than the 15 foot restriction involved in *Schenck, supra* or the 36 foot zone considered in *Madsen, supra*. These restrictions were struck in part because they eliminated the demonstrators ability to speak to their targets in conversational tones. This problem does not exist with the statute's legislated 8 foot zone. In fact, there is evidence in the record that a protestors message is more readily received better if it is delivered from a distance of 8 feet than if it is delivered from closer proximity. Affidavit of Dr. Marianne LaFrance, JA 228 and 287.

The language of the statute makes it clear that its purpose is to protect the health of Colorado citizens by insuring their access to medical care. This is consistent with the government's responsibility to protect the health, safety and welfare of its citizens.

During the hearings conducted by the Colorado General Assembly in considering the adoption of this statute, compelling testimony was offered on a number of issues. A nurse who works at a clinic which provides abortions as well as other healthcare services testified that abortion protestors yell, thrust signs in faces, and generally try to upset the patients as much as possible, making it much more difficult to provide care in an already scary situation. She testified of people following along the sidewalk to get as close to cars as possible and that they continue yelling at patients up until the time they get into the clinic. JA 66-67.

Another witness testified that she was a volunteer at a healthcare facility that provided abortions among other healthcare services. In the course of her volunteer services she would escort patients into and out of the clinic. She testified that all during this process the protestors would yell and scream. The protestors also flashed signs that contained images of a bloody fetus and would yell you are killing a baby. The demonstrators shouted that the escorts were guards from Dachau, making reference to World War II Nazi

concentration and extermination camps utilized to commit crimes against humanity. She testified that the protestors would talk about fetuses and babies being dismembered, arms, and legs being torn off. The same witness told of derogatory racial comments. A young black women came for services and protestors called her "Mammy."

The same witness offered testimony about another patient at that same clinic who approached the clinic and was immediately surrounded by protestors who were yelling and screaming at her. When the witness finally reached this young woman, she found her in tears. After the patient and her mother were in the clinic, the mother looked at the witness and said "I can't believe this happens in this country. My daughter was raped." JA 69-71.

Another witness testified about the protestors behavior during demonstrations that the protestors referred to as rescues. The witness testified that the protestor's first action was always to block the entrance to the driveway of the clinic. This forced the patients to park on the street and make their way through the mass of demonstrators. The so-called escorts for the clinic would attempt to assist the patients in their efforts to enter the clinic. The demonstrators would try to stop their access and surround them. Demonstrators would push and shove the patients and escorts. Sometimes the demonstrators would lose their tempers and they would kick

and bite the patients and escorts. Demonstrators would try to physically pull the patient out from within the midst of the escorts. Some of the protestors were arrested for trespassing when they refused to leave the property of the clinic. The witness also testified that they had as much trouble getting the patients out of the clinic after treatment as they did getting them into the clinic. JA 158-159.

There was also testimony that this obstructive behavior by protestors was not limited to abortion clinics. A witness representing the Colorado Coalition of Persons With Disabilities testified in support of the bill and gave examples of other protests. He testified about a patient in Pittsburgh who was dying of hepatitis and received a baboon liver to save his life. As a result of this surgical procedure he became the target of animal rights activists. This witness also testified about an incident in Florida where a person with a disability became the target of anti-Medicaid protestors who ultimately assaulted him and knocked him out of his wheelchair. JA 107 -108.

The Colorado Supreme Court considered the testimony presented in the committee hearings of the General Assembly, and, in fact, quoted some of the testimony referred to herein. Ultimately, the Colorado Supreme Court concluded:

> With such a legislative history, it is obvious, and Petitioners do not refute, that the General

> Assembly's actions were motivated by its interest in preserving the health and safety of Colorado citizens. In particular, the General Assembly enacted section 18-9-122 as a means of assuring a citizens access to medical "counseling and treatment at Colorado healthcare facilities." Pet. App. 9a and 10a.

Petitioners would have us conclude that a Colorado citizen's right to healthcare is secondary to petitioners right to demonstrate[5]. This court has made it clear that the exercise of First Amendment activity is not without restriction. The case presently before the court has similarities to the focused picketing considerations in *Frisbee v. Schultz*, 487 U.S. 474 (1988). A patient trying to enter a healthcare facility during a public demonstration is a captive audience for the message presented by the demonstrators. The patient may be presented with no alternative than to run the gauntlet of the demonstration if they are to receive healthcare services. If an individual were going to a restaurant, a convenience store, or a gasoline filling station, they may choose to select one of several other locations for these products rather than go to the

[5] Petitioner Hill in her testimony to the Colorado General Assembly testified "can anyone show me the law in Colorado that says anyone has a right to unrestricted healthcare, especially when it is at the expense of other people's freedom?" JA 160.

site of the demonstration. These options are not available for a patient who is receiving treatment or services from a doctor or healthcare facility at a specific location. If that facility is being picketed the patient must encounter the demonstration or forego the healthcare services.

The captive audience aspects of this case make the logic of *Frisbee v. Schultz, supra* applicable here. In *Frisbee* this court held "Because the picketing prohibited by the Brookfield Ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the state has a substantial and justifiable interest in banning it." There is evidence that this protest activity has substantial negative impact on patients that encounter these demonstrations. Affidavit of Dr. Warren Hern, JA 219 - 222. This court has long recognized that citizens are not required to be subjected to or accept the message of demonstrators. *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939); and *Kovacs v. Cooper*, 336 U.S. 77 at 86-87 (1949).

The Colorado Supreme Court's decision that this statute furthers a significant government interest is also supported by *Madsen, supra*. In *Madsen* this court supported the Florida Supreme Court's determination that the state has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy. *Madsen* also supports the conclusion that targeted

picketing of the home threatens the psychological well-being of the captive resident, and that targeted picketing of the hospital or clinic threatens not only the psychological, but also the physical, well-being of a patient held captive by medical circumstances. *Madsen* at 767 and 768; see also *Schenck, supra* at 376 (holding that unimpeded access to clinics is a significant governmental interest). All of these interests are supported by the statute adopted by The Colorado General Assembly and upheld by the Colorado Supreme Court.

E. The statute is a reasonable time, place or manner restriction that leaves ample alternative channels of communication.

There are two final questions left in the determination of whether this statute satisfies the constitutional standards set forth in *Ward, supra.* They are: (1) Is the statute a time, place or manner restriction? (2) Does it leave open ample alternative channels of communication?

The Court, in a long line of decisions, has recognized the government's authority to impose reasonable (and content-neutral) restrictions on the time, place or manner of protected speech activities:

> [T]he government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are

> narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'

Ward, supra, at 791; *See also, Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry, supra,* at 45; *Heffron International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

The requirement that the regulation be "narrowly tailored" does not mean that the regulation must employ the "least restrictive means" that will vindicate the significant governmental interest. The Court stated in *Ward*:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Ward, supra, at 2757-59.

This statute in question is not an absolute ban on speech activity, and there are no restrictions that relate to time. The statute does impose limited place and manner restrictions.

C.R.S. 18-9-122(3) places no restriction on speech activity that occurs outside of a radius of 100 feet from the entrance to a healthcare facility. Within the 100 foot radius the statute provides what has become known as an eight foot "bubble" of protection. This statute provides that no persons shall "knowingly approach" within this eight foot bubble without the consent of the protected person. The Colorado Supreme Court has applied a narrowing construction to this provision to mean that no protestor that accidentally or unintentionally enters within this eight foot zone can be found in violation of the statute. Pet. App. 24a, 25a. This statute contains minimal restrictions on the place and manner of speech. Reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid. *City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789 (1984); *Heffron, supra*; *Kovacs* v. *Cooper, supra.*

Finally, we turn to the issue of "ample alternative channels for communication." This statute imposes limited restrictions on communication. Petitioners and everyone else can protest, educate, pray, chant, lecture, persuade, carry signs, and distribute literature on any subject that they choose. The prohibition included in the statute is to knowingly approach within eight feet of an individual who is within 100 feet of a healthcare facility entrance without that individual's

consent. Under the provisions of this statute a protestor may remain still and engage in his protest activities without fear of being in violation of the statute. In *Schenck*, to avoid violating the injunction, the protestors were required to maintain a separation of fifteen feet at all times. The requirement to withdraw and avoid contact is not present in the Colorado statute. To be in violation of the statute one must take the affirmative action of knowingly approaching within the eight foot buffer zone without consent.

II. C.R.S. 18-9-122 DOES NOT CREATE A PRIOR RESTRAINT ON SPEECH.

Petitioners have alleged that section 18-9-122(3) is a prior restraint on speech. Petitioners allege the result of the statute is that no speech is permissible unless permission is granted. Pet. Brf. 27 They also argue that the consent provisions of the statute make the beneficiaries of the statute agents of the state in censoring speech. Pet. Brf. 27 and 28.

In fact, the statute does not ban speech, it merely gives individuals entering into and exiting from healthcare facilities a minimal protection from becoming the captive audience of demonstrators. The only protest activity that is limited is the knowing approach another person when consent to do so is denied. The demonstrator is still free to deliver the message

by the means they have chosen without approaching that individual.

Petitioners extend this argument to claim that a patient's decision not to consent to a demonstrator's intrusion into their eight foot bubble of protection constitutes state action and a licensing scheme of censorship. Petitioners quote *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) for the proposition "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." While this may be true, the statute under consideration is not a prior restraint and this presumption does not come into effect. The flaw in petitioners' argument is that there is no state action involved in an individual denying consent to a protestor to approach within eight feet. This is simply an individual taking action they believe necessary to preserve their own health and safety.

Petitioners make reference to *Evans v. Newton*, 382 U.S. 296, 299 (1966) and *Reno v. American Civil Liberties Union*, 521 U.S. 844 and other cases for the proposition that individuals or groups endowed with powers or functions of the government become agencies or instrumentality's of the and subject to its constitutional limitations. A review of *Evans, supra* at 299 also states "Yet generalizations do not decide concrete cases. Only by sifting facts and weighing circumstance… can we determine whether the reach of the

Fourteenth Amendment extends to a particular case". *Burton v. Williamton Parking Authority*, 365 U.S. 715 (1961) omitted from body of quote.

The cases cited by petitioners to support their censorship argument present substantially different situations than the one before this court. The cited cases deal with some action taken by the government, or done on its behalf, and resulting impact on the public in general. Petitioners equate the invocation of personal rights by individuals in denying them consent to approach with governmental action. Clearly this is flawed logic.

If a protestor was on private property and refused to leave when asked to do so by the property owner they would be subject to arrest for trespassing. The property owner may invoke his personal right to protect his property. Similarly this statute enables an individual within one hundred feet of a health care facility to exercise his personal right to allow someone to approach them, or to prohibit that action. This statute does not give them control over any speech activity as it relates to any other location or any other person. This is not government action or censorship.

The balance of petitioners' arguments concerning licensing speech and lack of procedural safeguards are also based upon the flawed premise that an individuals utilizing the protection of the eight foot buffer zone provided in the statute

constitutes state action. For the reasons described above none of these arguments are valid and should be disregarded by this court.

III. THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

The Petitioners have made a facial challenge to the statute as being unconstitutionally vague. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. The United State Constitution requires adequate notice of unlawful acts, it does not require the language of a legislative enactment to be mathematically precise. *Miller v. California*, 413 U.S. 15, 28 (1973); *Grayned v. City of Rockford, supra*, 104 and 110. The Constitution does not require impossible standards; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,* 332 U.S. 1, 7-8 (1947). Legislation is entitled to a presumption of constitutionality. *Parker v. Levy,* 417 U.S. 733, 757 (1974); *United States v. National Dairy Corp.*, 379 U.S. 29, 32-33 (1963).

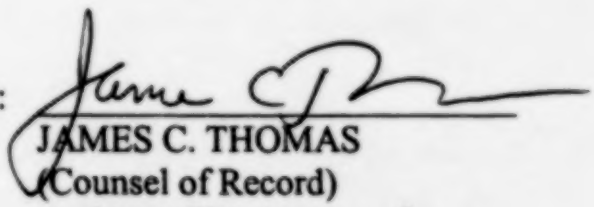
The statute adopts words and phrases used in normal conversation that are readily understood by the public. It is

concise in its statement of what behavior is permitted and what behavior is prohibited. In addition to this, the Colorado Supreme Court in its ruling has defined and limited the scope of the application of this statute. When the appropriate standards for vagueness are applied to this statute it clearly survives this vagueness challenge.

IV. CONCLUSION.

The judgment of the Colorado Supreme Court, upholding the statute as a valid time, place and manner restriction designed to assure safety and order for citizens entering and leaving healthcare facilities, should be affirmed.

Respectfully submitted this 10th day of December, 1999.

By: 

JAMES C. THOMAS
(Counsel of Record)
Assistant City Attorney for
The City and County of Denver
303 West Colfax, Suite 500
Denver, Colorado 80224
(720) 913-8050

DEC 13 1999

(16)

Supreme Court, U.S.
FILED
DEC 13 1999
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No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, *et al.*,
Petitioners,

v.

STATE OF COLORADO, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF AMICI CURIAE OF NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE, NATIONAL ABORTION FEDERATION, NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

(Additional *Amici* Listed On Inside Front Cover)

LUCINDA M. FINLEY
(Counsel of Record)
SUNY at Buffalo Law School
513 O'Brian Hall
North Campus
Buffalo, NY 14260
(716) 645-6152

MARTHA F. DAVIS
ROSLYN POWELL
YOLANDA S. WU
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street
New York, NY 10014
(212) 925-6635

JENNIFER C. JAFF
NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE
1156 15th Street, NW, Suite 700
Washington, DC 20005
(202) 973-3000

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INTEREST OF AMICI[1]

Amici are organizations dedicated to ensuring safe access to reproductive health care, many of whom have appeared before this Court in previous cases in which access to reproductive health care was threatened. *Amici* seek to advance their common mission through various means, including public education, representation of providers and patients in litigation, and advocacy. Some *amici* are organizations whose members are providers of reproductive health care; others are advocates and interested citizens. All *amici* are committed to ensuring that patients are not subjected to unwelcome, intimidating advances while seeking access to health care and, thus, support the position of Respondents in this case. The individual interests of *amici* are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

Amici adopt the statement of the case in Respondents' Brief.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Colorado Revised Statute § 18-9-122(3) is critical to the ability of individuals in Colorado to access health care safely. By merely regulating the physical proximity separating demonstrators from their targets, without in any way restricting the content of demonstrators' messages, the statute ensures the safe provision of health care. Mindful of the special circumstances affecting persons seeking access to health care, this Court has endorsed the view that the government can regulate abusive conduct targeted at entering health care facilities. *See Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The Colorado statute reinforces that notion by providing a critical zone of separation between demonstrators and health care providers and patients. By proscribing unwanted physically close encounters between demonstrators and their targets, the statute minimizes the potential adverse health effects caused by aggressive "in-your-face" confrontations in order to ensure safe access by all to needed health care.

The Colorado statute is a content neutral regulation that does not curtail speech. It simply regulates the distance between the demonstrator and his or her target, regardless of the content of his or her message. Demonstrators' First Amendment right to engage in numerous forms of communication such as leafleting, picketing, yelling, or singing within 100 feet of health care facilities is not restricted at all. Rather, demonstrators merely are prohibited from forcing unwanted close physical proximity within a distance of eight feet of a person entering a health care

facility. Such a restriction is clearly content neutral – it does not impinge on what a demonstrator can communicate; it controls only the demonstrator's proximity to his or her target. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992).

The statute's regulation of the physical distance between demonstrators and persons entering health care facilities is necessary to protect the government's unassailable interest in protecting individuals' right of access to health care. Because of the incompatibility of noisy, disruptive, threatening activity with the provision of health care services, this Court has long recognized the need to regulate certain types of protest activities around hospitals and other health care facilities. *See, Madsen*, 512 U.S. at 769-71. This is particularly true due to the intolerable health risks caused by the stress of unwanted face-to-face confrontations between demonstrators and individuals seeking access to health care. The Colorado statute, therefore, is an appropriate way for the state to ensure that individuals in Colorado have unimpeded access to health care.

Finally, although the appropriate standard for reviewing the Colorado statute is the time, place and manner test used by the Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the statute also is constitutional under the more stringent standard applied to injunctions: it is no more burdensome than necessary to protect the significant government interest in safe access to health care. *Madsen*, 512 U.S. at 765. Because the statute regulates only unwanted physical proximity, and does not curtail speech, it is narrowly tailored to meet the legislature's important

objective of protecting persons entering health care from aggressive, threatening invasions of their personal space caused by unwelcome, overly close physical encounters with demonstrators.

ARGUMENT

I. THE COLORADO STATUTE IS A CONTENT AND VIEWPOINT NEUTRAL REGULATION OF FORCED PHYSICAL PROXIMITY

On two recent occasions, this Court has found that government appropriately may regulate abusive "in-your-face" actions by protestors targeted at people seeking access to health care facilities who may be medically vulnerable. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The present case reiterates this principle so essential to the safe provision of health care. The method chosen by the State of Colorado to control the harms of coerced face-to-face confrontations with health care providers and patients is far less restrictive of demonstrators' rights than the demonstration-free "buffer zones" upheld in *Schenck* and *Madsen*. Colorado Revised Statutes § 18-9-122(3) (1999) regulates only the action of forced physical proximity of less than eight feet on an unwilling person specifically targeted by a demonstrator. It does not restrict or limit any speech; it simply prescribes the amount of space a demonstrator must maintain between himself and him mark when the person preyed upon does not wish to permit a closer physical encounter.

A. Because the Statute Regulates Only Forced Physical Proximity, It Does Not Prohibit Any Speech

Petitioners and their *amici* repeatedly mischaracterize the Colorado statute. They proclaim it to be a total ban on speech on the public sidewalk (Petitioners' Brief at 14); to operate so as to completely silence protestors (Petitioners' Brief at 25, 49); and to effectively ban all leafletting (Brief of American Federation of Labor and Congress of Industrial Organizations at 7). These characterizations completely distort the wording and effect of § 18-9-122(3). Within a geographic buffer zone of 100 feet from entrances to health care facilities, the statute permits any and all speech by demonstrators on any imaginable topic and from any conceivable point of view: picketing, chanting, praying, singing, yelling, using bullhorns. Leafletting also is fully preserved; stationary pamphleteers can stand anywhere on the sidewalk adjacent to a health care facility, or right alongside the facility's entrance within inches of everyone using that entrance, offering literature to anyone who wants it. The only thing that is proscribed within a 100-foot zone is "knowingly approaching" a specifically targeted person more closely than eight feet when such physically close presence is objectionable to the target. While standing eight feet away, the demonstrator still can say anything or display any sign or leaflet to that person. Demonstrators even can scream at that person, or continue to insist that the targeted person allow a closer approach or take a leaflet or look at a sign. The demonstrator does not have to cease and desist from saying a word, or from doing anything except knowingly approaching

someone at a distance of less than eight feet when the target objects to such proximity. *Cf. Schenck*, 519 U.S. at 384-85 (rejecting First Amendment challenge to injunctive provision that required demonstrators to cease and desist from all communication with an unwilling target and back away to a distance of fifteen feet). Under the Colorado statute, patients seeking access to health care are not shielded from any messages or any messengers; they are protected solely from demonstrators knowingly approaching them at a distance of less than eight feet.

Colorado's speech-permissive regulation of the space between demonstrator and target does not curtail any First Amendment right. No court has ever acknowledged a First Amendment right to force close physical proximity on individuals entering or leaving health care facilities. On the contrary, numerous courts have held that the conduct regulated by the Colorado statute – approaching physically close to someone who does not want such a confined encounter – is independently proscribable as harassment and invasion of another's personal space, disorderly conduct, or stalking.[2] *See, e.g., New York State NOW v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989) (no First Amendment right to demonstrate in close proximity to particular people; doing so is tortious harassment and invasion of personal space), *cert. denied*, 495 U.S. 947 (1990); *Galella v. Onassis*, 487 F.2d

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[2]This is not to say that harassment and stalking laws are adequate substitutes for zone of separation statutes. As is demonstrated by the state law harassment and stalking cases cited in the text, *infra*, unlike clinic access offenses, harassment and stalking typically require repeated contacts over time, often in the context of an historically acrimonious personal relationship.

986 (2d Cir. 1973) (shadowing, coming too close to, and photographing Jackie Onassis and her children without their consent, even for newsgathering purposes, constitutes tortious harassment and is unprotected by First Amendment); *Petersen v. State*, 930 P.2d 414 (Alaska Ct. App. 1996) (repeatedly closely approaching targeted person against that person's wishes can constitute stalking, and is not constitutionally protected); *City of Fargo v. Brennan*, 543 N.W.2d 240 (N.D. 1996) (protestor prosecuted for disorderly conduct for invading personal space and waving arms close to unwilling targeted victim; court holds that this is physically intimidating, threatening conduct not protected by First Amendment); *People v. Blackwood*, 476 N.E.2d 742 (Ill. App. 1985) (man subject to prosecution for coming physically close to ex-wife and screaming at her; court finds this conduct "not subject to constitutional protection under any circumstances"); *People v. Calvert*, 629 N.E.2d 1154 (Ill. App. 1994) (criminal harassment and assault charges for coming physically close to individual who did not want the contact, and screaming and gesticulating in her face); *Welsh v. Johnson*, 508 N.W.2d 212 (Minn. 1993) (protestor may be prosecuted under harassment statute for invading clinic employee's personal space); *Flamm v. Van Nierop*, 291 N.Y.S.2d 189 (Sup. Ct. 1968) (conduct of walking or driving physically close to plaintiff constitutes torts of assault and intentional infliction of emotional distress).

In sum, the Colorado statute regulates only the conduct of knowingly approaching physically closer than eight feet to someone who does not welcome such a physically invasive manner of message delivery. This speech- permissive "don't get too close" statute is a

reasonable content-neutral time, place, and manner regulation. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

B. The Statute Is Content-Neutral Because It Regulates Physical Proximity Irrespective of Content or Viewpoint

The first criterion for whether a statute that affects expressive activity may be upheld as a reasonable time, place, and manner regulation is the requirement that it be content-neutral, or justified without reference to the content of the regulated expressive activity. *Ward*, 491 U.S. at 791; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).[3] Petitioners mistakenly argue that the Colorado statute is not content-neutral because it applies to the expressive activity of unwelcome close physical approaches only when done for the purposes of "oral protest, counseling, or education." (Petitioners' Brief at 31-32). Petitioners and their *amici* have confused the purpose or method employed by a speaker for communicating his or her message with the content or viewpoint of that message. This Court's content-neutrality analysis has been concerned *not* with how a speaker conveys a message, but with whether a statute or injunction singles out speech for regulation because of its content or viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) (explaining Court's concern

[3]As will be discussed in section III, *infra*, even if the stricter test applied to injunctions in *Madsen* and *Schenck* governed here, the Colorado law would be constitutional.

with viewpoint discrimination). In innumerable past cases, this Court has upheld as content-neutral statutes and injunctions that apply to particular forms or methods of communication, so long as the statutes have not been targeted at particular messages or views on a topic. *See, e.g., Madsen*, 512 U.S. at 764 (restriction on "demonstrating" within certain distance of health care facility); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (ban on face-to-face solicitation in airports); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (ban on posting signs on public property); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (ban on disruptive "demonstrations" near schools); *Rowan v. United States Post Office*, 397 U.S. 728 (1970) (ban on unwelcome mailings). Petitioners' argument is notably similar to the argument rejected in *Madsen*, in which this Court held that an injunction's application only to the activity of "demonstrating" by the defendants did not render it unconstitutionally content-specific. *Madsen*, 512 U.S. at 762-63.

The Colorado statute is based on an extensive legislative record depicting demonstrators who frequently crowded, pushed, swarmed around, and came intimidatingly physically close to people seeking health care. Thus, its restriction on unwanted physical proximity is justified without reference to the content of the message of any demonstrator. The aim of the statute is to protect people seeking health care from physical intimidation and crowding so as to facilitate unfettered, safe access. (*See, e.g.*, JA at 59-60, 113-17). The statute does not insulate anyone in the vicinity of a health care facility from any message or

viewpoint. From the modest distance of eight feet, or even closer if remaining stationary, demonstrators may direct any message they wish to anyone. Any protestor is free, from the readily visible and audible distance of eight feet, to preach about the importance of birth control or against its evils; to exhort for or against euthanasia or animal research; to praise or condemn the labor policies of the health care facility; to embrace or castigate HMOs; to read from the Bible or the Koran or from anti-religious tracts.

Petitioners also argue that Colorado statute § 18-9-122(3) is content-specific because demonstrators' ability to get physically very near to someone hinges on that person's consent to the physical closeness. (Petitioners' Brief at 31-33). This argument is virtually identical to the argument rejected in *Schenck*, 519 U.S. at 384-85. In *Schenck* the petitioners unsuccessfully asserted that the "cease and desist and back away" provision upheld by this Court was content-specific because it applied only when someone disagreed with the message of so-called sidewalk counselors. *Id.* This Court specifically rejected that argument, noting that the cease and desist provision affected only physical proximity between demonstrator and unwilling target, not the demonstrator's ability to convey a message. *Id.* at 385. "These counselors remain free to espouse their message outside the 15-foot buffer zone." *Id.*

That observation, made by this Court in *Schenck*, applies with even greater force here. Under the Colorado statute, all that the target can refuse is an unwanted physical approach closer than eight feet. Targeted individuals cannot silence any message being directed to them or to anyone else. From eight feet away – which is a normal conversational

distance, especially for encounters between strangers in public (*see* Section II.B, *infra)* – protestors and their messages will be fully and easily audible and visible. No speech is silenced; all viewpoints still can be conveyed from a normal conversational distance.

For these reasons, Petitioners' attempt to analogize the Colorado statute to a "heckler's license or veto" is unavailing. (Petitioners' Brief at 23). The heckler's or listener's veto principle applies when speech is completely and prematurely cut off, or the speaker is prevented entirely from conveying her ideas. *See Edwards v. South Carolina*, 372 U.S. 229, 237-38 (1963) (peaceful speakers may not be arrested for breach of peace because their speech may stir people to anger, invite public dispute, or bring about unrest); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (licensing scheme may not allow regulator to preclude speech entirely by denying a license application because of anticipated reaction by listeners). A listener's opposition ordinarily may not be the reason for restricting a speaker's ability to reach other willing listeners. *See, e.g., Cohen v. California*, 403 U.S. 15, 23 (1971) (overturning breach of peace conviction despite the assertion that opposition to language on the back of defendant's jacket could incite viewers to violence); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (overturning breach of peace conviction although religious proselytizer's message "not unnaturally aroused animosity" in listeners).

Here, in contrast, no listeners can veto or silence any protestor from addressing them or anyone else. All unwilling targets can do is refuse to agree to have a message directed at them from closer than eight feet. Petitioners'

"listener's veto" argument fundamentally misunderstands both the operation of the Colorado statute, and this Court's prior decisions. No decision of this Court ever has held or even suggested that there is a right to persist in forcing speech on someone who does not want to be subjected to it at an invasively close physical distance.

Rather, prior decisions consistently have emphasized that there is no right to force speech on unwilling listeners. "Nothing in the Constitution compels us to listen to or view any unwanted communication," and there is no "right to press even a 'good' idea on an unwilling recipient." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737-38 (1970). The right to distribute literature extends only to those "willing to receive it." *Schneider v. State*, 308 U.S. 147, 162 (1939). If there is no right to force one's message or literature on an unwilling recipient, then surely there is no right to force one's close physical presence on a person who wishes to preserve a couple of arms' length of personal space. As this Court emphasized in *Madsen*, face-to-face protest activity focused on vulnerable individuals who cannot easily avoid the close physical contact threatens patients' psychological and physical well-being and, thus, it appropriately may be regulated. 512 U.S. at 768. *See also Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (ban on residential picketing); *International Society of Krishna Consciousness v. Lee*, 505 U.S. at 684 (ban on airport solicitation).

II. THE COLORADO STATUTE IS NECESSARY TO PROTECT THE SIGNIFICANT GOVERNMENTAL INTEREST IN SAFE ACCESS TO HEALTH CARE

The principle that targeted "in-your-face" physically close demonstration directed at vulnerable individuals can be regulated applies with particular force in the health care context. People seeking or recovering from medical procedures often are at their most physically and psychologically vulnerable. As one witness, a disabled person who had undergone 35 surgeries, testified to the Colorado legislature, going in for medical care is a time of great stress and anxiety, and "[y]ou don't need additional stressors placed upon you when you are dealing with what for most people is the most stressful time in their entire lives." (JA at 157).

The tradition of quiet zones around hospitals is firmly entrenched, based on the recognition that noise, disruption, and confrontation are fundamentally incompatible with, and actually dangerous to, the normal and essential functions of health care. This Court reiterated in *Madsen* that because noisy, disruptive, invasive, threatening, and intimidating activities clearly are inappropriate in a health care setting, there is a strong governmental interest in protecting people from these dangers. 512 U.S. at 772-73.

An important component of the "time, place, and manner" inquiry is assessing whether certain kinds of protest activities are or incompatible with the purposes and needs of the places at which the activities are targeted. *See Grayned*, 408 U.S. at 116. Because the "cacophony of political protest" is so fundamentally incompatible with the needs of

health care facilities, staff, and patients, *Madsen*, 512 U.S. at 772-73, this Court has upheld restrictions on protest or solicitation activity at health care facilities that might not be justifiable in non-health care settings. *See, e.g., NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979) (ban on union solicitation in areas frequented by patients and their families is permissible); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (same); *Madsen*, 512 U.S. at 769-71 (complete ban on all protest activity within 36 feet of entrance to health care facility is permissible).

The significance of the governmental interest underlying the Colorado statute – protecting safe and unfettered access to health care – is unassailable. Petitioners, however, understate the scope of this public interest when they argue that other provisions of the Colorado statute, such as the prohibition on physically obstructing access to health care, are fully sufficient to secure the governmental interest. (Petitioners' Brief at 21 n. 13). The governmental interest in securing safe access to health care is not sufficiently protected by simply prohibiting obstruction and blocking. Although physically preventing people from getting into or out of health care facilities undoubtedly is adverse to the compelling governmental interest in public health, forcing people to run a gauntlet of unobstructive but highly intimidating and stressful protest activity also seriously undermines the governmental interest in medical safety. It is this latter aspect of the governmental interest in safe access to health care – the need to reduce intimidation and physical and psychological stress – to which § 18-9-122(3) is directed.

A. Unwanted Invasions of Personal Space While Seeking Health Care Are Intimidating and Physically and Psychologically Dangerous

It is well-established in empirical medical and social science studies that maintaining an inviolate zone of personal space is indispensable to human functioning and physical and emotional security. (JA at 285-86, Affidavit of Expert Witness Dr. Marianne LaFrance). The risk to patients of unwelcome, threateningly close advances prior to undergoing a medical procedure was considered by the Colorado legislature, and formed an important basis for the enactment of the eight foot zone of separation in § 18-9-122(3). (JA at 108, 134, 136-37).

Maintaining a zone of personal space is essential to sustain privacy, and to provide a buffer against physical or psychological threat. (JA at 286). Research has established that in the United States, the necessary amount of personal space to maintain a sense of security and safety when encountering strangers in public is eight to twelve feet. (JA at 286). Edward T. Hall, *The Effects of Personal Space and Territory on Human Communication*, in NONVERBAL COMMUNICATION IN HUMAN INTERACTION 114-31 (Mark L. Knapp ed., 1978). Unwanted knowing invasions of personal space by strangers are perceived as aggressive and intimidating, and may trigger distinct physiological reactions: arousal, a "fight or flight" reaction, elevated blood pressure, palpitations, hyperventilation, and urinary retention. (JA at 273-74). *See* Irwin Altman, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING 93 (1975); Marianne

LaFrance et al., *Sex Differences in Reaction to Spatial Invasion*, 102 SOCIAL PSYCHOLOGY 59 (1977). *See also United States v. Scott*, 958 F. Supp. 761, 767 (D. Conn. 1997) (finding as fact that demonstrators' activity outside health care facility increases medical risk of surgical procedure).

These physiologic stress reactions can be exacerbated in the medical care context, when someone already is anxious, upset, or stressed by their illness or impending surgery. For most patients, even a minor surgical procedure can present "an important problem of emotional stress." Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 INT'L J. ORAL MAXILLOFACIAL SURGERY 688, 694 (1987). Patients subjected to exacerbated stress prior to surgical care have more complications, poorer surgical outcomes, experience greater pain and require greater use of painkillers or anaesthesia. *Id.*; Bernard S. Linn, M.D. et al., *Effects of Psychophysical Stress on Surgical Outcome*, 50 PSYCHOMATIC MEDICINE 230 (1988); Anne Mayande et al., *Anxiety and Endocrine Responses to Surgery*, 54 PSYCHOMATIC MEDICINE 275 (1992).

The Colorado law protects peoplewho are moments away from obtaining medical care from unwanted invasions of personal space and the attendant heightened medical risks. As such, it is both integrally related and narrowly tailored to the government's significant interest in ensuring safe conditions for health care.

In the context of reproductive health care facilities, many of which are besieged battlegrounds, as the legislative record in this case so starkly demonstrates, the governmental

interest in protecting people from intimidating, targeted, close physical encounters is particularly compelling. When a patient is coming in for the results of a pap smear, pregnancy test, rape counseling, or an abortion, she already may be experiencing a great amount of stress, and the unwanted close physical encounters with aggressive demonstrators significantly exacerbates it in physically dangerous ways. (JA at 66, 105 150). *See, e.g.*, Nancy E. Adler, et al., *Psychological Factors in Abortion*, AM. PSYCHOLOGIST 1194 (Oct. 1992); Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. SOC. & CLINICAL PSYCHOL. 404 (1994) (stress from unwanted encounters with protestors leads to increased post-surgical depression).

The expert medical affidavit of Dr. Warren Hern demonstrates that, when patients seeking reproductive health care suffer the physiological harms emanating from unwanted invasions of personal space, it is more difficult to provide medical care safely. (JA at 273-74). Urinary retention may make it difficult to do an accurate pelvic exam; hyperventilation and agitation can lead to muscle spasms, which increase the risks of complications from surgery. (JA at 273-74).

The record in the *Schenck* trial court highlights other elevated medical risks from unwanted close physical encounters with demonstrators at reproductive health care facilities. Patients may be too stressed to absorb or follow important information about their surgery and follow-up care; they can be so fearful of encounters with demonstrators that they refuse to return for follow-up care, or delay medical

care so long that risks of complications are elevated; and they can suffer asthmatic attacks or dehydration. *See Pro-Choice Network of Western New York v. Project Rescue*, 799 F. Supp. 1417 (W.D.N.Y. 1992).

Other courts have found that similar adverse health effects result from unwelcome, "in-your-face" demonstrations outside of health care facilities. For example, in *United States v. Scott*, 958 F. Supp. at 767, the court found that:

> Shouting, pushing, blocking and otherwise interfering with a patient's access to [a health care facility] can increase the patient's stress level, and thereby increase the risks of a subsequent abortion procedure in the following ways. First, if the procedure is being done under local anesthesia, a stressed patient may experience significantly more pain than a patient who is not stressed. The stressed patient may also move around on the table during the procedure which creates a risk that the doctor could puncture the wall of the uterus. Second, if the procedure is being done under general anesthesia, a stressed patient requires significantly more anesthetic to keep her calm. This increases the risks of complications, such as aspiration of stomach contents. Finally, stressed patients may have increased post-operative risks. A stressed immune system has more difficulty fighting off infection.

(Internal citations omitted). These adverse medical effects resulted not from blockades, but from unwanted, aggressive "in-your-face" physical approaches to people on foot or in automobiles. *Id.* at 767-70. *See also Operation Rescue v.*

Planned Parenthood, 1998 WESTLAW 352942 (Tex. July 3, 1999) ("patients would enter clinics visibly shaken, crying, and nervous. Physicians reported increased respiration, heart rate, and blood pressure among such patients, which at times required sedatives to treat. These symptoms, some of which patients experienced even in the absence of protesters, became more acute when the demonstrations occurred.").

This sort of conduct, and its accompanying medical risks, goes well beyond the merely annoying, boisterous, robust debate on the public sidewalks that this Court has said we all must tolerate. *Boos v. Barry*, 485 U.S. 312, 318 (1988). This Court never has suggested that, in the name of "free speech," medical patients must unwillingly endure physically close invasions of their personal space that have well-documented adverse effects on their physical and psychological health, or that are sufficiently severe to deter them from obtaining timely medical care.

B. Zones of Separation Are an Essential Tool for Preserving Medical and Public Safety

The problems of aggressive physical confrontation and intimidation of people seeking health care services at facilities that offer abortions are not confined to Colorado and Western New York. They are enduring problems of national scope that led Congress to pass the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (1994).

While the passage of FACE in 1994 has had a positive effect on reducing physical blockades of reproductive health care facilities, targeted harassment of

staff and patients, and disruptive picketing continues unabated, against a backdrop of dramatic incidents of fatal violence. U.S. General Accounting Office (GAO), Report to the Ranking Member, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, *Abortion Clinics: Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act*, 2 (Nov. 1998). Disruptive picketing at reproductive health care facilities has escalated from a 1994 level of 1,407 instances, to a 1998 peak of 8,402 reports of picketing at clinics.[4] National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers* (last modified Nov. 1999) <http://www.prochoice. org/ violence/ 99vd.htm> (hereinafter "NAF, *Incidents of Violence*"). An overwhelming majority – 78%, of abortion providers in the U.S. – experienced some form of disruptive picketing in 1997. Stanley Henshaw, et al., *Alan Guttmacher Institute Working Paper on Abortion Access* (1999).

The psychological toll of this protest activity on staff and patients is inalterably colored by the climate of increasing violence directed at reproductive health clinics. In 1998, there were two murders of abortion providers, and one attempted murder that left its victim permanently maimed. NAF, *Incidents of Violence*. During the period from January 1, 1997 to November 16, 1999, there were 8 clinic bombings, 20 arsons, 8 attempted bombings or arsons, and 41 death threats directed at clinic staff or patients. *Id.*

Each of these incidents inevitably heightens the

[4]"Disruptive picketing" generally is defined as protest activity that harasses, intimidates, and impedes staff or patients. *Id.*

perception of intimidation and fear from unwanted physical approaches by protestors. A telling example of this effect was revealed in testimony at the post-*Schenck* trial in *People of the State of New York et al. v. Operation Rescue National et al.*, CV. 99-209A (W.D.N.Y. 1999). Patients who had undesired close physical encounters with protestors while entering the clinic where one of the murdered doctors had worked remarked to clinic staff that they were terrified that the protestors were going to "get" them "like they got your doctor." (Testimony of Melinda DuBois). Others testified that when protestors closely approached pedestrians with their large, 3-foot square signs, people were so intimidated they walked into the busy street in an attempt to get away. One person walking her young child to elementary school could not get out of the way of the demonstrator, who aggressively moved close to her while brandishing his large sign, and the sign fell on her and bruised her eye. (Testimony of Gina DiChiara). If this protestor had been required to stay eight feet away, or to remain stationary as this pedestrian walked past, he could not have wounded this woman.

Although the buffer zone upheld by this Court in *Schenck* was in full force and effect at these Western New York clinics, the intimidating, physically close encounters described above took place outside the fixed buffer zone. Thus, zones of separation between protestors and their targets, such as the one in the Colorado statute, are essential tools for maintaining public safety and reducing intimidation of medical patients. In fact, testimony before the Colorado legislature demonstrated the beneficial effects of "de-escalation" after the nearly identical Boulder and Denver,

Colorado ordinances were enacted. (JA at 106-7, 147, 210).

A zone of separation provision in an injunction or statute may be the only practicable way to protect public safety and access to medical care. It is not geographically or constitutionally feasible to craft a fixed buffer zone at every reproductive health facility that will protect everyone seeking access from unwanted aggressively close physical encounters. Some urban clinics open directly onto a public sidewalk, and are served by parking lots or bus or train stops blocks away; staff and patients must then traverse a lengthy gauntlet of protestors attempting to impede and intimidate them, and get in their face before they reach the safety of the buffer zone. *See, e.g., Scott*, 958 F. Supp. at 765, 783 (describing physical location of clinic and proximity to parking and bus stops). In such a case, a sufficiently large fixed buffer zone extending more than a full city block would be a significantly more restrictive means of protecting the governmental interests than a narrow zone of separation. Legislatures and courts must preserve every option, including a modest zone of separation between protestors and their targets, to resolve the particular harms they seek to address.

III. THE COLORADO STATUTE IS NARROWLY TAILORED AND BURDENS NO MORE SPEECH THAN NECESSARY TO PROTECT THE GOVERNMENTAL INTEREST IN SAFE ACCESS TO HEALTH CARE

Amici agree with Respondents that the *Ward* time, place, and manner test for assessing statutes that affect speech rights is the appropriate standard to be applied to the

Colorado statute, and that this case does not present an occasion for revisiting the issue of the slightly different standards used to evaluate injunctions and generally applicable statutes. However, the Colorado statute is constitutional even under the *Madsen - Schenck* test used for injunctions: it burdens no more speech than necessary to protect the significant governmental interest in safe access to health care. *Madsen*, 512 U.S. at 765; *Schenck*, 519 U.S. at 371.

By regulating only unwanted targeted physical proximity while curtailing not even unwelcome speech, § 18-9-122(3) is precisely tailored to the problem the legislature sought to address: close invasions of personal space that impede and crowd patients and are inherently intimidating because of their physical closeness and unwelcomeness.

Unlike the fifteen-foot zone of separation struck down in *Schenck*, the eight-foot zone in the Colorado statute does not burden any more speech than necessary because eight feet is a "normal conversational distance" for public communication between strangers. *United States v. Scott*, 187 F.3d 282, 288 (2d Cir. 1999) (upholding eight-foot injunctive zone of separation). One does not have to raise one's voice to be heard from a distance of eight feet, and even small signs will be visible from a distance of two arms' length.

Moreover, by prohibiting only "knowingly approaching without consent," the Colorado statute eliminates the risk of inadvertent violations that troubled this Court in *Schenck*, 519 U.S. at 378-79, and permits a demonstrator to stand still anywhere outside a health care facility, even when a patient passes them at a distance of less

than eight feet.[5] This is a crucial distinction from the *Schenck* fifteen-foot zone, because that provision, lacking any scienter element, required demonstrators at all times to stay fifteen feet away from everyone seeking access to the clinic. Under the Colorado statute, no demonstrator has to back away from anyone; a demonstrator must refrain only from "knowingly approaching" a specific individual within eight feet. Any demonstrator can offer a leaflet to anyone who passes, and if stationary demonstrators position themselves close to a health care facility's entrance they will have highly effective leafletting access to everyone going in or coming out.[6] If any passerby reaches out his or her hand to take a leaflet, the protestor is free to step right up to that passerby because the passerby has signaled his or her willingness to permit closer proximity.

The Colorado statute also is significantly different from, and much narrower, than the "no approach" provision

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[5]Because the Colorado law prohibits only "approaches," Petitioners and their *amici* err when they argue that the statute prohibits all leafletting. (Brief of the American Federation of Labor and Congress of Industrial Organizations, at 7). Demonstrators who wish to leaflet either may stand still anywhere outside a health care facility, or they may approach up to eight feet away from their target with an outstretched arm, in which case, if the target wants to accept the leaflet, all he or she has to do is take one or two steps closer.

[6]Permitting demonstrators to stand still near the entrance of a health care facility does not defeat the purpose of the statute. It is the movement of the approach, when combined with proximity, that is intimidating, especially in the context of reproductive health care facilities, outside of which so much violence has occurred. *See* NAF, *Instances of Violence*.

invalidated in *Madsen*. The injunctive provision this Court struck down in *Madsen* prohibited all approaches within 300 feet of the clinic. 512 U.S. at 773-74. There was no provision in the *Madsen* injunction indicating that a demonstrator could approach up to any specific distance within the 300-foot zone, permitting the construction that the injunction prohibited any and all demonstration within 300 feet of the facility. This swept up far more speech than necessary, because it would have barred simply starting to cross the street or walk down the sidewalk to move towards a person 300 feet away. Thus, the *Madsen* "no approach" provision allowed no opportunity even to come within shouting distance, much less normal conversational distance. *Id.* at 774.

In contrast, the Colorado statute permits all approaches, whether welcome or not, within 100 feet of the clinic. The only prohibition is against approaching a specific targeted person at a distance closer than the normal conversational and personal-space distance of eight feet. Unlike the *Madsen* provision, pursuant to the Colorado law, all forms of constitutionally protected activity are allowed and remain fully meaningful because they can be seen and heard without shouting or straining. Unlike the broader prohibition in *Madsen*, the Colorado statute confers permission to approach someone even without his or her consent right up to eight feet away. This ensures that all speech can be received, regardless of whether it is welcome. No passerby or patient can escape any protestor's message; they are afforded a mere two arms' length zone of personal space in which to proceed on their way, insulating them from physical and psychological intimidation without silencing

any speech whatsoever.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

Lucinda M. Finley
(Counsel of Record)
SUNY at Buffalo Law School
O'Brian Hall – North Campus
Buffalo, New York 14260
(716) 645-6152

Jennifer C. Jaff
National Abortion and Reproductive
Rights Action League
1156 15th Street, NW, Suite 700
Washington, DC 20005
(202) 973-3021

Martha F. Davis
Roslyn Powell
Yolanda S. Wu
NOW Legal Defense
and Education Fund
395 Hudson Street
New York, NY 10014
(212) 925-6635

APPENDICES

APPENDIX A

STATEMENTS OF AMICI

Abortion Access Project

The Abortion Access Project (AAP) is a group of activists and health care providers that seeks to increase awareness of abortion as a critical part of comprehensive reproductive health services, address the shortage of abortion providers, and ensure access to abortion for all women. Around the country and including Colorado, health care professionals and patients have been subjected to physical and verbal assaults, intimidation, and harassment, all aimed at interfering with the exercise of the right to abortion. The presence of anti-abortion protesters at the doors of clinics is also intended to intimidate health care professionals who include abortion in their medical practice. In this context, the limited restriction on protesters near clinic entrances is necessary to protect women's right to abortion.

The American Jewish Committee

The American Jewish Committee (AJC), a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that this goal can best be achieved by preserving the constitutional rights, including the fundamental right of access to abortion, of all Americans. While firmly committed to defending the First Amendment's freedom of expression guarantees, AJC believes that

harassment designed to impede others in the exercise of their constitutional rights has no place in this or any other public policy debate.

The American Jewish Congress

The American Jewish Congress (AJCongress) is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. AJCongress is a supporter of both a woman's right to choose and the right of citizens to peacefully express themselves on matters of political and social importance. Because this case requires this Court to strike a balance between those rights, AJCongress is seeking to file this brief.

The Center for Constitutional Rights

The Center for Constitutional Rights is a national, non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.

Founded in 1966, the Center undertakes litigation on behalf of women seeking to vindicate their civil rights, engages in advocacy on behalf of women and women's rights organizations on a wide range of issues, and assists in the development of legislative policy at the municipal, state and federal levels of government. The Center's current women's' rights and education docket focuses primarily on

issues surrounding the severe repression of women's choices regarding sexuality, reproduction, and childrearing, discrimination and unfair treatment in employment, and violence against women in the home and in the workplace.

The Center for Reproductive Law and Policy

The Center for Reproductive Law and Policy (CRLP) is a non-profit legal and policy advocacy organization dedicated to protecting women's reproductive rights. CRLP's domestic and international programs engage in litigation, policy analysis, legal research and public education, and seek to ensure that all women have access to appropriate and freely chosen health services.

Colorado NARAL

Colorado NARAL is a pro-choice political organization representing 5,000 members statewide that works to protect and promote reproductive choices for all of Colorado. Colorado NARAL and its volunteers worked hard to pass this statute, having witnessed the harassment of women, physicians, and other clinic workers at reproductive health care facilities.

The Colorado Women's Bar Association

The Colorado Women's Bar Association (CWBA) is a professional association of attorneys, comprised primarily of female attorneys who live and practice in Colorado. The CWBA strives to promote, advance and protect the interests

and welfare of women. Through participation in this case, the CWBA seeks to protect the privacy and safety of women who seek medical care. Physical intimidation tactics and outright violence by abortion protesters impede women's access to necessary medical care and discourage medical professionals from providing medical services. The CWBA believes the Colorado restriction on extremely close contact between protestors and women seeking medical care is a constitutionally permissible restriction.

The Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,400 individuals and organizations. CWEALF seeks to join this brief as amicus curiae because we are committed to protecting women's reproductive rights. CWEALF initiated and wrote an amicus brief in a similar case, *U.S. and Connecticut v. Scott*, in 1998.

The Feminist Majority Foundation

The Feminist Majority Foundation (the Foundation) is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights and safe access to abortion and birth control. The Foundation actively pursues legal

protection for reproductive health services, and provided legal counsel for Respondents in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), which upheld the use of clinic safety buffer zones. The Foundation also submitted amicus curiae briefs in support of the Solicitor General in *Reno v. Condon*, No. 98-1464, and of the Respondents in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). The Foundation runs the largest clinic access program in the nation, working with physicians and clinic staff, as well as law enforcement, to protect reproductive health care providers from threats of violence and from violence. Since 1989, the Foundation's National Clinic Access Project has mobilized and trained more than 45,000 volunteers in 47 cities in 27 states, including Colorado, to assist clinics targeted by anti-abortion groups.

National Abortion Federation

The National Abortion Federation (NAF) is the professional association of abortion providers in the United States and Canada. NAF members include over 350 nonprofit and private clinics, women's health centers, Planned Parenthood facilities, and private physicians in 49 states, including nine clinics in Colorado. NAF's programs include accredited continuing medical education and training, clinic security, public and consumer education, and advocacy in furtherance of its mission to keep abortion safe, legal, and accessible.

As an organization representing abortion providers, NAF is very familiar with the effects of anti-abortion disruption on patients and facilities. The fear that patients experience as a

result of anti-abortion protests and harassment can increase the risk of complications during the abortion procedure, posing a threat to women's health. NAF strongly believes that Colorado's buffer zone legislation is crucial in protecting the public and ensuring the safety of patients.

National Abortion and Reproductive Rights Action League; National Abortion and Reproductive Rights Action League Foundation

The National Abortion and Reproductive Rights Action League (NARAL) and the NARAL Foundation (hereinafter "NARAL"), with 29 state affiliates and hundreds of thousands of members and supporters nationwide, are dedicated to keeping abortion safe, legal, and accessible for all women. NARAL's mission is to work through the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. NARAL supports and protects as a fundamental freedom a woman's right to make reproductive choices through education, training programs, and public policy initiatives. NARAL recognizes that the nationwide campaign of anti-choice violence threatens women's right to choose abortion by exacting a physical and emotional price from patients who seek access to abortion, and by exacerbating the shortage of doctors willing to provide abortion services.

The National Center for the Pro Choice Majority

The National Center for the Pro Choice Majority is a non-profit organization that provides a research and information service to the pro-choice movement. It publishes a national newsletter, *The Pro Choice Report*, which informs its readers about the many varied occurrences that impact on the right to legal abortion. The organization has specialized in monitoring the hundreds of clinic/medical office blockades and protests that have been conducted by anti-abortion militants, and the resulting trials and convictions.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to combat gender-based discrimination and secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF's work is to secure reproductive rights for all women. To this end, NOW LDEF has litigated numerous cases involving clinic violence and efforts to protect safe access to reproductive health services, including *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), *New York State Nat'l Org. for Women v. Terry*, 952 F. Supp. 1033 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 86 (1998), *cert. denied, Pearson v. Planned Parenthood Margaret Sanger Clinic*, 119 S. Ct. 2336 (1999) and *Nat'l Org. for Women v. Operation Rescue*, 929 F. Supp. 461 (D.D.C. 1996). NOW LDEF has also intervened on behalf of doctors, women and

clinics to defend the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, against constitutional challenges in several cases, including *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997). NOW LDEF consults with local advocates across the country on the legal issues surrounding local residential picketing and buffer zone ordinances, and has published *Drawing the Line*, a handbook for community advocates seeking to enact, enforce and defend ordinances that preserve women's access to reproductive health care facilities and protect health care providers' safety and privacy.

National Women's Health Network

The National Women's Health Network is an independent, member-supported organization dedicated to safeguarding women's health rights and interests. The Network advocates for better policies on women's health and provides women with information and resources to assist them in making better health care decisions. Nationwide, the Network has more than 12,000 individual members and 300 organizational members. Since it was founded in 1975, the Network has advocated for policies that preserve and protect a woman's right to determine her own reproductive future. The Network's support for the statute in question in *Hill v. Colorado* stems from the organization's commitment to protecting women's access to high quality health care without unnecessary medical risks and to ensuring that women are able to exercise reproductive rights without fear of harassment or violence.

The Northwest Women's Law Center

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and expanding women's reproductive rights, and has long focused on the threats to women's access to abortion providers. Toward that end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest, and the country, to ensure that women have the ability to make their own reproductive choices. For example, in *Aradia Women's Health Center, et al. v. Operation Rescue, et al.*, the NWLC represented abortion clinics, women's groups, physicians and patients in a case against Operation Rescue. The Law Center obtained the first injunction in the country that applied to all clinics in the state, and effectively stopped the blockades by bringing contempt actions against blockaders who refused to obey the court's injunction. The NWLC has also, *inter alia*, challenged efforts by prosecutors to bring criminal charges of child abuse against women who use controlled substances while pregnant; successfully fought anti-choice initiatives, and challenged efforts to force sterilizations on developmentally disabled women. The NWLC is currently involved in legislative and litigation efforts that seek to limit women's reproductive freedom. The NWLC continues to serve as a regional expert and leading advocate on reproductive freedom.

Planned Parenthood Federation of America

Planned Parenthood Federation of America (PPFA), a not-for-profit corporation organized in 1922, is the leading national voluntary health organization in the field of family planning. Currently, PPFA has 132 affiliates in 47 states and the District of Columbia operating approximately 875 health centers. PPFA affiliates offer a wide range of services relating to reproductive health, including abortion.

PPFA, whose members and affiliates provide abortions and other medical treatment, have a strong and abiding interest that this Court be fully aware of the profoundly harmful consequences for medical patients and the provision of medical care that result from anti-abortion harassment and intimidation outside of abortion clinics and other medical facilities. PPFA, its members and affiliates, have obtained and will continue in the future to seek, injunctive relief similar to that at issue in this case in an effort to lessen the often devastating impact of the protesters' conduct upon abortion and non-abortion patients alike, and upon the providers' ability to render care.

Planned Parenthood of the Rocky Mountains, Inc.; Planned Parenthood of the Rocky Mountains Services Corporation

Amici curiae Planned Parenthood of the Rocky Mountains, Inc., and Planned Parenthood of the Rocky Mountains Services Corporation (PPRM and PPRMSC) are providers of reproductive health care to women and men in Colorado.

PPRM is the oldest and largest provider of reproductive health care services in Colorado and presently operates a network of 30 health facilities located throughout the state. Although PPRM does not provide abortion services, several of its health facilities have been the target of organized protest. PPRM offered testimony before the General Assembly in favor of Colo. Rev. Stat. § 18-9-122, and was granted leave to participate as *amicus curiae* in this matter by the Colorado Court of Appeals and the Colorado Supreme Court.

PPRMSC was organized in 1999 to provide comprehensive reproductive health services, including medical and surgical abortion, in Colorado. PPRMSC presently operates four health facilities located in the cities of Colorado Springs, Denver, Durango, and Fort Collins. Its Denver health facility is the target of organized protests and demonstrations five days a week. In Colorado Springs, protesters appear at the health facility every Saturday, while in Fort Collins and Durango, demonstrations are unannounced and unpredictable.

Both PPRM and PPRMSC's interests will be substantially affected by the Court's decision in this matter, as the statute serves to protect their patients throughout Colorado.

Republicans For Choice

Republicans For Choice (RFC), with over one hundred thousand members nationwide, is dedicated to keeping family planning and reproductive health care accessible for

all women.

RFC's mission is to work through the political process to ensure every woman the right to make personal decisions regarding the full range of reproductive health care. RFC supports and protects as a fundamental freedom a woman's right to make reproductive choices through education, training programs and public policy initiatives.

RFC recognizes that the nationwide campaign of anti-choice violence, harassment and intimidation has created a climate of fear. This threatens women seeking care at reproductive health care facilities by exacerbating the health effects of their fear.

The Women's Law Project

The Women's Law Project (the Law Project) is a Philadelphia-based, non-profit women's legal advocacy organization founded in 1974 for the purpose of advancing women's legal, social, and economic status. The Law Project provides free telephone counseling to 8,000 callers a year on problems including domestic violence, child support and custody, divorce, employment discrimination, and welfare.

The Law Project has litigated extensively on behalf of women's medical providers and patients. Its litigation docket has included such landmark reproductive rights cases as *Planned Parenthood v. Casey, Elizabeth Blackwell Health Center for Women v. Knoll. Roe v. Operation Rescue,* and *Thorn burgh v. American College of Obstetricians and*

Gynecologists. A number of its clients have experienced illegal, violence clinic blockades, arson fires, bomb threats, assaults, chemical attacks, and death threats by anti-abortion extremists. The Law Project has advocated for vigorous enforcement of the Freedom of Access to Clinic Entrances Act and has worked extensively with local and state law enforcement authorities in Pennsylvania to assure the safety of abortion providers and their patients.